

The Public Trust Doctrine in Pennsylvania

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1.0 Origins

In 1862, in *Shrunk v. President, Managers & Co. of Schuylkill Navigation Co.*, the Supreme Court of Pennsylvania recognized the public's right to navigate and fish in public waterways.¹ The court declared that "there is no natural right of the citizen, except the personal rights of life and liberty, which is paramount to his right to navigate freely the navigable streams of the country he inhabits."² A half-century later, in 1915, in *Board of Trustees of Philadelphia Museums v. Trustees of University of Pennsylvania*, the Supreme Court held that when a governmental body has dedicated land to a public purpose, it may not divest the land to a private party.³

In 1971, the General Assembly passed and the voters of Pennsylvania ratified⁴ Article I, section 27 of the state Constitution.⁵ The amendment states:

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.⁶

¹ 42 Pa. 219, 228 (Pa. 1826) (holding that a city may construct a bridge over a river, providing the city not violate the U.S. Constitution or prevent navigation).

² *Id.* at 228.

³ 96 A. at 123, 123 (Pa. 1915) (enjoining a city from selling public museums built on public parks to a university because city ordinances dedicated the land to a public purpose and because the city had "appropriated money for the care, maintenance and improvement of at least portions of the land in question").

⁴ Amending the Pennsylvania Constitution is governed by PA. CONST. art. XI, § 1.

⁵ PA. CONST. art. I, § 27; *See* Com. by Shapp v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 596 (Pa. 1973) (Jones, J., dissenting). "The amendment received 1,021,342 votes: more than any candidate seeking state-wide office." *Id.*

⁶ PA. CONST. art. I, § 27. One commentator has suggested that the amendment creates two rights. *See* John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part I—An Interpretive Framework for Article I, Section 27*, 103 DICK. L. REV. 693, 700 (1999). The first sentence of the

Two years later, in 1973, the Pennsylvania courts handed down two decisions that greatly limited the potential strength of the amendment.

In the first case, *Com. by Shapp v. National Gettysburg Battlefield Tower, Inc.*, the Pennsylvania Supreme Court heard a challenge brought by the Pennsylvania Governor to the proposed construction of a 300-foot observation tower on private land near the Gettysburg battle site.⁷ The governor, acting under what he believed was his trust responsibility to the citizen's of the Commonwealth under Article I, section 27 of the Constitution, sought to enjoin construction of the tower because it would "disrupt the skyline, dominate the setting from many angles, and still further erode the natural beauty and setting which once was marked by the awful conflict of a brothers' war."⁸

In a fractured ruling, the Supreme Court voted five to two to deny the Commonwealth's request for an injunction against construction of the tower.⁹ Although five of the seven justices rejected the requested injunction, a majority concluded that Article I, section 27 was self-executing and therefore the executive branch could sue under the amendment to protect citizen's interest in natural and cultural resources.¹⁰ Two years later, in *Community College of Delaware*

amendment establishes a constitutional right to clean air and clean water and to the preservation of the natural, scenic, historic and esthetic values of the environment. *Id.* The second part of the amendment establishes that the Commonwealth is a trustee over public natural resources. *Id.* As the author points out, however, Pennsylvania courts have not adopted this two-part approach to interpreting the amendment. *Id.* at 696. Instead, the courts treated the amendment as vaguely pro-environment and, as a result, "diminished its importance." *Id.*

⁷ 311 A.2d at 589.

⁸ See *id.* at 590 (quoting Dr. Milton E. Flower, Professor of Political Science, Dickinson College).

⁹ *Id.* at 595.

¹⁰ *Id.* Justice Roberts filed a concurring opinion joined by Justice Manderino to explain that he believed the executive branch had the "power to protect and preserve for its citizens the natural and historic resources now enumerated in Section 27." *Id.* at 595 (Roberts, J., concurring). Justice Roberts continued: "The express language of the constitutional amendment merely recites the 'inherent and independent rights' of mankind relative to the environment . . . *Id.* (quoting PA. CONST. art. I, § 1). Chief Justice Jones filed a dissenting opinion joined by Justice Eagen in which he concluded that the amendment was self-executing and that the court should enjoin construction of the tower. *Id.* at 597, 599 (Jones, J., dissenting). Justice Jones appeared apoplectic in his opinion, writing that the majority "emasculated" and "disemboweled" the amendment. *Id.* at 596, 599. The Justice concluded with two strongly punctuated words: "I dissent!!" *Id.* at 599. Announcing the result, Justice O'Brien explained his belief that the governor did not have a cause of action under Article I, section 27 because the amendment was not self-

County v. Fox, the Commonwealth Court¹¹ cited *Gettysburg Tower* in holding that Article 1, section 27 was self-executing.¹² Nevertheless, Pennsylvania courts have never granted the Commonwealth an injunction under the amendment.

Also in 1973, in *Payne v. Kassab*, the Commonwealth Court heard a challenge to a Department of Transportation (DOT) street-widening project that called for taking approximately half an acre of a public park.¹³ The plaintiffs argued that the DOT project violated Article 1, section 27 because the Commonwealth was required to preserve the public park.¹⁴ The court reasoned that “judicial review of the endless decisions that will result from balancing of environmental and social concerns [under Article 1, section 27] must be realistic and not merely legalistic.”¹⁵ The court then established a three-part test to determine whether a political body violated Article 1, section 27: (1) did the agency comply with all applicable statutes and

executing. *Id.* at 595. Justice O’Brien explained that the General Assembly needed to pass supplemental legislation defining the values to be protected and the procedures to be followed before the executive branch could sue under the amendment. *Id.* at 594, 595. *See also* Com., Dept. of Environmental Resources v. Com., Public Utility Commission, 335 A.2d 860, 864 n.5 (Pa. Commw. Ct. 1975) (explaining that in *Gettysburg Tower* “four Justices expressed their views on the question of whether the provisions of Article 1, Section 27 of the Pennsylvania Constitution are self-executing, and they were equally divided on this point. The three other Justices of the Court did not express opinions on this question but supported the affirmance on other considerations, thus reaching a majority result rather than a majority decision.”).

¹¹ In the Pennsylvania judicial system, the Commonwealth Court hears original civil cases brought against or by the Commonwealth, appeals from the Common Pleas Court (a civil and criminal trial court) involving the Commonwealth or local agencies, and appeals from decisions by state agencies. *See* ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS, THE JUDICIAL BRANCH: A CITIZEN’S GUIDE 2 (2008). Only the Supreme Court of Pennsylvania may hear appeals of decisions by the Commonwealth Court. *See id.*

¹² 342 A.2d 468, 474 (Pa. Commw. Ct. 1975) (upholding a sewage permit issued by the state Department of Environmental Resources under the *Payne* test). *Fox* notwithstanding, subsequent case law continued to confuse the issue. In *O’Connor v. Pennsylvania Public Utility Com’n*, 582 A.2d 427 (Pa. Commw. Ct. 1990) property owner plaintiffs conceded that *Gettysburg Tower* held that Article I, section 27 was not self-executing and required supplemental legislation. *Id.* at 431. The plaintiff’s then argued that a historic preservation law was supplemental to the constitutional amendment and therefore a historic commission advisory issued pursuant to the preservation law was binding on a public utility commission that sought to construct a substation. *Id.* at 429. The Commonwealth Court disagreed, concluding that a recommendation by the historic commission was merely advisory. *Id.* at 430. In *Harley v. Schuylkill County*, 476 F.Supp. 191 (D.C. Pa. 1979), a Federal District court made a passing reference to *Gettysburg Tower* for the holding that Article I, section 27 is not self-executing. *Id.* at 195 (ruling that a prison guard has the right to disobey a prison warden if obeying would deprive a prisoner of a constitutional right).

¹³ 312 A.2d 86, 88 (Pa. Commw. Ct. 1973), *aff’d*, 361 A.2d 263, 272, 273 (Pa. 1976).

¹⁴ *Id.* at 94.

¹⁵ *Id.*

regulations? (2) did the agency make a reasonable effort to minimize the environmental harm? and (3) would the environmental harm “so clearly outweigh the benefits” of the project that approval of the project was an abuse of discretion?¹⁶ Applying the test, the court upheld the DOT project.¹⁷ Under the *Payne* test, the public trust doctrine only requires the government to comply with statutes and attempt some mitigation of environmental harm. As discussed below in section 8.1, the only post-*Payne* case grant a private plaintiff an injunction against the government was overruled.¹⁸

In 1991, in *National Solid Wastes Management Ass'n v. Casey*, the Commonwealth Court delivered another blow to Article 1, section 27, ruling that the governor did not have authority to regulate landfills under the amendment.¹⁹ In 1989, concerned about the state of existing landfills and problems of creating new landfills, the governor issued Executive Order 1989-8.²⁰ The executive order directed the Department of Environmental Resources (DER) to cease reviewing applications for new municipal landfills until DER developed a municipal waste plan that limited the amount of waste accepted at existing landfills and that set standards for the approval of new landfills.²¹ The court invalidated the order, concluding that the amendment did not give the

¹⁶ *Id.* The three-part test was first proposed by the defendant DOT in a briefing document. See Dernbach, *supra* note 4 at 710.

¹⁷ 312 A.2d at 94.

¹⁸ In re Conveyance of 1.2 Acres of Bangor Memorial Park to Bangor Area School Dist. 567 A.2d 750 (Pa. Commw. Ct. 1989), *overruled by* In Re Golf Course, 963 A.2d 605, 612 (Pa. Commw. Ct. 2009) (en banc), *appeal granted*, 971 A.2d 490 (Pa. 2009). For other cases applying *Payne* to uphold action that would admittedly harm the environment, see, for example, Community College of Delaware County v. Fox, 342 A.2d 468, 482 (Pa. Commw. Ct. 1975) (denying a challenge to the issuance of a sewage permit by the state Department of Environmental Resource (DER) that involved running a pipe along a creek because DER satisfied the three *Payne* standards); Pennsylvania Environmental Management Services, Inc. v. Com., Dept. of Environmental Resources, 503 A.2d 477; (Pa. Commw. 1986) (reversing the denial of a permit by DER to construct a landfill and remanding to the Environmental Review Board to consider the *Payne* factors); Blue Mountain Preservation Ass'n v. Township of Eldred, 867 A.2d 692, 704 (Pa. Commw. Ct. 2005) (upholding a city plan to construct a race track for high speed vehicles adjacent to the Appalachian Trail because the city satisfied the *Payne* factors).

¹⁹ 600 A.2d 260 (Pa. Commw. Ct. 1991), *aff'd per curiam* 619 A.2d 1063 (Pa. 1993).

²⁰ See *id.* at 261.

²¹ *Id.*

governor authority “to disturb that legislative scheme” or “to alter DER’s responsibilities pursuant to that scheme.”²²

2.0 The Basis of the Public Trust Doctrine in Pennsylvania

In 1973, in *Gettysburg Tower*, the Pennsylvania Supreme Court explained that since its ratification in 1971, Article 1, section 27 of the Pennsylvania Constitution had “install[ed] the common law public trust doctrine as a constitutional right to environmental protection susceptible to enforcement by an action in equity.”²³ The right of the public to use navigable waters remains rooted in common law.²⁴ For all other purposes, Article 1, section 27 is the basis of the public trust doctrine in Pennsylvania.

3.0 Institutional Application

In the 1973 case *Payne v. Kassab*, discussed below in section 3.3, the Commonwealth Court established a three-part test for challenges to administrative action that all but erased the public trust doctrine as a tool for concerned citizens challenging government action.²⁵ Subsequent cases have further weakened the public trust doctrine’s institutional application. In *In re Erie Golf Course*, discussed below in parts 3.1, the Commonwealth Court applied a state statute rather than the public trust doctrine to uphold a city’s alienation of a public golf course.²⁶ In *Pilchesky v. Rendell*, discussed below in section 3.2, the Commonwealth Court upheld under the public trust doctrine legislative action approving the alienation of public land.²⁷

3.1 A Restraint on Alienation (private conveyances)

²² *Id.* at 265.

²³ *Com. by Shapp v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 596 (Pa. 1973); PA. CONST. art. I, § 27; *see supra* Part 1.0.

²⁴ *See Shrunk v. President, Managers & Co. of Schuylkill Navigation Co.*, 42 Pa. 219 (Pa. 1826) (holding that a city may construct a bridge over a river, providing the city not violate the U.S. Constitution or prevent navigation).

²⁵ 312 A.2d 86, 88 (Pa. Commw. Ct. 1973), *aff’d*, 361 A.2d 263, 272, 273 (Pa. 1976).

²⁶ 963 A.2d 605, 612 (Pa. Commw. Ct. 2009) (en banc), *appeal granted*, 971 A.2d 490 (Pa. 2009).

²⁷ 932 A.2d 287, 290 (Pa. Commw. Ct. 2007).

In 2009, in *In re Erie Golf Course*, concerning an attempted conveyance by a city of a public park to a school district for construction of a public school, an *en banc* panel of the Commonwealth Court of Pennsylvania addressed inconsistencies in several lower court opinions²⁸ over when a court should apply the public trust doctrine, rather than the state Donated or Dedicated Property Act (Act),²⁹ to determine a government's ability to alienate dedicated lands.³⁰ The lower court in *Erie Golf Course* applied the public trust doctrine to invalidate the city's attempted divestment of a dedicated public golf course.³¹ The court reasoned that a restriction in the deed to the golf course that required the city to "keep and maintain the premises as a golf course or for public park purposes or both" constituted a "formal record," and therefore the Act did not govern the dispute.³² Citing earlier cases that relied on the public trust doctrine to

²⁸ Compare *In re Conveyance of 1.2 Acres of Bangor Memorial Park to Bangor Area School Dist.*, 567 A.2d 750 (Pa. Commw. Ct. 1989), *overruled by* *In Re Golf Course*, 963 A.2d 605, 612 (Pa. Commw. Ct. 2009) (*en banc*), *appeal granted*, 971 A.2d 490 (Pa. 2009) (using the public trust doctrine to deny a city's attempt to convey a portion of a public park to a school district because there was a formal dedication of the park to a public purpose) and *Vutnoski v. Redevelopment Authority of Scranton*, 941 A.2d 54 (Pa. Commw. Ct. 2006), *overruled by* *In Re Golf Course*, 963 A.2d at 612 (refusing to apply the Act to a city's attempted conveyance a public sports complex to a university but upholding the conveyance under the state Urban Redevelopment Law) with *White v. Township of Upper St. Clair*, 799 A.2d 188 (Pa. Commw Ct. 2002) (applying the Act to the construction of a telecommunications tower on public land, notwithstanding a formal designation of the land to recreation, conservation, and historical purposes, and remanding for determinations under the Act) and *Petition of Borough of Westmont*, 570 A.2d 1382 (Pa. Commw Ct. 1990) (applying the Act to uphold a trial court's removal of a "municipal use only" restriction on city owned property.)

²⁹ 53 PA. CONS. STAT. §§ 3381–3386 (2008). Under the Act, a political subdivision may seek a court order to relinquish, sell, or substitute a dedicated property for another property if the subdivision determines the original use of the property is no longer possible or no longer serves the public interest. *Id.* § 3384.

³⁰ 963 A.2d 605, 612 (Pa. Commw. Ct. 2009) (*en banc*), *appeal granted*, 971 A.2d 490 (Pa. 2009). The court explained that the golf course was dedicated to public use because the golf course deed included a "restriction requiring the City or its successors or assigns to keep and maintain the premises as a golf course or for public park purposes or both." *See id.* at 606.

³¹ *See id.* at 606, 609.

³² *See id.* at 606, 608. Section 2 of the Act states: "All lands or buildings heretofore or hereafter donated to a political subdivision for use as a public facility, or dedicated to the public use or offered for dedication to such use, where no formal record appears as to acceptance by the political division, as a public facility and situate within the bounds of a political subdivision . . . shall be deemed to be held by such political subdivision, as trustee, for the benefit of the public with full legal title in the said trustee." 53 PA. CONS. STAT. § 3382 (2008) (emphasis added). The trial court relied on the phrase "where no formal record appears" to conclude that where there was a formal record dedicating the land to public use, as in the *Erie* golf course deed, the Act did not apply and the public trust doctrine provided the rule of decision. 963 A.2d at 608.

prevent cities from divesting public parks,³³ the court ruled that the city could not sell the golf course, but must keep and maintain the property for a public purpose.³⁴

The Commonwealth Court reversed the trial court's application of the public trust doctrine, concluded that the proper law to apply was the state statute, and explained that the court must defer to the city's determination that the golf course no longer served the public interest.³⁵ The court remanded the case and ordered the lower court to consider the city's petition to sell the golf course under the proper standards.³⁶ The Pennsylvania Supreme Court agreed to hear an appeal of the Commonwealth Court's decision, which is pending.³⁷

3.2 A Limit on the Legislature

In 2007, in *Pilchesky v. Rendell*, the Commonwealth Court ruled that the state general assembly did not violate a state statute,³⁸ the state Constitution,³⁹ or the common law public trust doctrine when the legislature passed a law approving the transfer of ten acres of public land from a city to a university.⁴⁰ The city of Scranton purchased the ten acres at issue in 1977 with state funds under the state Project 70 Land Acquisition and Borrowing Act (Act 70),⁴¹ and the state legislature designated the ten acres for open space, historic, and recreational purposes. Under Act 70, the owner of land acquired and dedicated under the Act may not alienate the land without

³³ *Board of Trustees of Philadelphia Museums v. Trustees of University of Pennsylvania*, 96 A. 123, 123 (Pa. 1915) (using the common law public trust doctrine to deny a city's attempt to convey property to a university because the city had dedicated the property to a public purpose through a city ordinance); *In re Conveyance of 1.2 Acres of Bangor Memorial Park to Bangor Area School Dist.*, No. 1988-1138, WL 219723 (Pa. Ct. Com. Pleas 1988), *overruled by* *In re Golf Course*, 963 A.2d at 612 (using the public trust doctrine to deny an attempt by a city to convey a portion of a park to a school district or the construction of a new school).

³⁴ 963 A.2d at 609. The trial court also analyzed the city's application *if, arguendo*, the Act was the proper law to apply. *Id.* Applying the Act, the trial court nevertheless concluded that the city's application to abandon the golf course failed. *Id.*

³⁵ *Id.* at 612-14; 53 PA. CONS. STAT. §§ 3381-3386 (2008).

³⁶ 963 A.2d at 614.

³⁷ *In re Erie Golf Course*, 971 A.2d 490 (Pa. 2009).

³⁸ Project 70 Land Acquisition and Borrowing Act, 72 PA. CONS. STAT. §§ 3946.1-3946.22 (2008).

³⁹ PA. CONST. art. I, § 27.

⁴⁰ 932 A.2d 287, 290 (Pa. Commw. Ct. 2007).

⁴¹ *See id.* at 288; 72 PA. CONS. STAT. §§ 3946.1-3946.22 (2008).

approval from the General Assembly.⁴² In 2003, in response to a request from the city of Scranton, the legislature passed Act 52, authorizing the transfer of the ten acres from the city to the university free of Act 70 restrictions. A taxpayer sued alleging that Act 52 violated Act 70, Article I, section 27 of the Pennsylvania Constitution, and the common law public trust doctrine.

On the statutory claim, the Commonwealth Court ruled that Act 52 did not violate Act 70, reasoning that the legislature's express approval of the transfer in Act 52 satisfied the requirements of Act 70.⁴³ The court then dismissed plaintiff's constitutional claim with little discussion, concluding that the ten acres were not a "natural resource"⁴⁴ and therefore their alienation did not implicate Article I, section 27 of the Pennsylvania Constitution, requiring the state to maintain and conserve natural resources.⁴⁵ Finally, the court held that the public trust doctrine did not apply "in light of the legislative enactments concerning the [ten acres]."⁴⁶ The court did not elaborate in its reasoning for not applying the public trust doctrine, but *Pilchesky* indicates an aversion on the part of Pennsylvania courts to limit conveyances specifically approved by the General Assembly under either the public trust doctrine.

3.3 A Limit on Administrative Action

The leading Pennsylvanian case applying Article 1, section 27 of the Pennsylvania Constitution to administrative action is *Payne v. Kassab*, concerning a Department of Transportation (DOT) street-widening project that called for taking approximately half an acre of a public park.⁴⁷ In *Payne*, the Commonwealth Court established a three-part test to determine whether the agency project violated Article 1, section 27, which required the state to conserve

⁴² 932 A.2d at 290.

⁴³ *Id.*

⁴⁴ The court did not provide support or an explanation for its determination that the public land was not a "natural resource" as contemplated by constitutional amendment.

⁴⁵ *Id.* PA. CONST. art. I, § 27.

⁴⁶ *Id.*

⁴⁷ 312 A.2d 86, 88 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263, 272, 273 (Pa. 1976).

and maintain natural resources for the benefit of the public.⁴⁸ The court asked: (1) did the agency comply with all applicable statutes and regulations? (2) did the agency make a reasonable effort to minimize the environmental harm? and (3) would the environmental harm “so clearly outweigh the benefits” of the project that approval of the project was an abuse of discretion?⁴⁹ The court determined that the city had complied with historic preservation and environmental laws, had sufficiently mitigated environmental impacts by planting trees and using special construction materials, and that improved traffic was a sufficient benefit to justify taking the public land.⁵⁰ Since 1973, the *Payne* test has proved a substantial burden for plaintiffs alleging agency violations of Article 1, section 27 because agencies need only demonstrate that they complied with statutes and attempted environmental mitigation and because the court will defer to agency determinations regarding the benefits of their action.⁵¹

4.0 Purposes

As discussed below in part 4.1, Pennsylvania courts apply the common law public trust doctrine to protect the public’s right to navigate and fish on waters that are navigable-in-fact.⁵² Since its ratification in 1971, Article 1, section 27 of the Pennsylvania Constitution subsumed the

⁴⁸ *Id.*

⁴⁹ *Id.* The three-part test was first proposed by the defendant DOT in a briefing document. See Dernbach, *supra* note 4 at 710.

⁵⁰ 312 A.2d at 94–96.

⁵¹ For other cases applying *Payne* to uphold action that would admittedly harm the environment, see, for example, *Community College of Delaware County v. Fox*, 342 A.2d 468, 482 (Pa. Commw. Ct. 1975) (denying a challenge to the issuance of a sewage permit by the state Department of Environmental Resource (DER) that involved running a pipe along a creek because DER satisfied the three *Payne* standards); *Pennsylvania Environmental Management Services, Inc. v. Com., Dept. of Environmental Resources*, 503 A.2d 477; (Pa. Commw. 1986) (reversing the denial of a permit by DER to construct a landfill and remanding to the Environmental Review Board to consider the *Payne* factors); *Blue Mountain Preservation Ass’n v. Township of Eldred*, 867 A.2d 692, 704 (Pa. Commw. Ct. 2005) (upholding a city plan to construct a race track for high speed vehicles adjacent to the Appalachian Trail because the city satisfied the *Payne* factors).

⁵² See, e.g., *Shrunk v. President, Managers & Co. of Schuylkill Navigation Co.*, 42 Pa. 219 (Pa. 1826) (holding that a city may construct a bridge over a river, providing the city not violate the U.S. Constitution or prevent navigation); 42 Pa. 219 (Pa. 1862) (upholding a state law that approved the construction of a bridge because the statute required a larger area beneath the bridge for navigation).

public trust doctrine for ecological purposes.⁵³ Unlike the flexible common law doctrines of other jurisdictions,⁵⁴ however, Pennsylvania courts have severely limited the potential scope of Article 1, section 27, as discussed below in part 4.2.

4.1 Traditional Purposes: Navigation/fishing

The primary rights recognized by the public trust doctrine are the public rights to fishing and navigation.⁵⁵ In 1862, in *Flanagan v. City of Philadelphia*, the Supreme Court of Pennsylvania, in upholding a state law that approved the construction of a bridge, declared: “There is no natural right of the citizen, except the personal rights of life and liberty, which is paramount to his right to navigate freely the navigable streams of the country he inhabits. It is superior even to the right of fishing, which contributes to the food on which the community subsists, for it has been judicially decided that when the rights of navigation conflict with the rights of fishing, the latter must give way to the former.”⁵⁶ *Flanagan* was cited on this point as recently as 1997 by Judge Kelly of the state Superior Court, dissenting in *Pennsylvania Power & Light Co. v. Maritime Management, Inc.*⁵⁷ to explain his view that a dammed creek was navigable-in-fact because the creek was historically used to transport timber.⁵⁸

4.2 Beyond Traditional Purposes: Recreational/ecological

⁵³ See *Com. by Shapp v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 596 (Pa. 1973) (stating that the Pennsylvania Constitution had “install[ed] the common law public trust doctrine as a constitutional right to environmental protection susceptible to enforcement by an action in equity.”); PA. CONST. art. I, § 27; see *supra* Part 2.0.

⁵⁴ See, e.g. *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 48, 49 (N.J. 1972) (extending the public’s right above the high water line to all publicly owned beaches). “The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.” *Id.*

⁵⁵ 42 Pa. 219 (Pa. 1862).

⁵⁶ *Id.* at 228.

⁵⁷ 693 A.2d 592 (Pa. Super. Ct. 1997), *cert. denied* 705 A.2d 1310 (Pa. 1997) (concluding that a reservoir was not navigable-in-fact and that therefore a private party could restrict the use of alcohol on the water).

⁵⁸ 693 A.2d at 600 (J. Kelly, dissenting).

Article 1, section 27 of the Pennsylvania Constitution arguably expanded the public's rights as to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values, as well as expanded the Commonwealth's trust responsibilities over of Pennsylvania's public natural resources. But Pennsylvania courts have proved reluctant to recognize these rights and responsibilities.⁵⁹

5.0 Geographic Scope of Applicability

As discussed below in sections 5.2, Pennsylvania courts apply the public trust doctrine to waters that are navigable in fact.⁶⁰ But, as explained below in sections 5.3 through 5.7, interpretations of Article 1, section 27 have greatly limited the potential scope of the public trust doctrine beyond navigable waters.

5.1 Tidal

Pennsylvania courts do not use the ebb-and-flow of the tide to determining the existence of state ownership or the application public trust doctrine.⁶¹ As discussed below in section 5.2, the proper test to apply in Pennsylvania is the navigable-in-fact test.

5.2 Navigable in fact

⁵⁹ See *In re Erie Golf Course*, 963 A.2d 605, 612 (Pa. Commw. Ct. 2009) (en banc), (refusing to apply the amendment to the alienation of dedicated public lands because a state statute authorized the alienation); *Belden & Blake Corp. v. Com., Dept. of Conservation and Natural Resources*, 969 A.2d 528, 531, 532 (Pa. 2009) (holding that a state agency could not prevent the owners of subsurface mineral rights from entering a state park to drill for oil and gas, notwithstanding the amendment). See also *supra* Part 1.0 (discussing *Com. by Shapp v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 596 (Pa. 1973) (refusing to enjoin the construction of a 300-foot observation tower near the Gettysburg battlefield under the amendment) and *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973) (establishing a three-part test and deferring to an agency to conclude that a road expansion project that required taking of part of a public park did not violate the amendment)).

⁶⁰ *Cleveland & Pittsburgh Railroad Co. v. Pittsburgh Coal Co.*, 176 A. 7, 9 (Pa. 1935) (applying the navigable in fact test to rule that lands flooded by a federal dam became the property of the state).

⁶¹ *Fulmer v. Williams*, 15 A. 726, 727 (Pa. 1888) (explaining that "on this continent the early settlers found large rivers with navigable tributaries, forming vast systems of internal communication, extending hundreds and in some instances thousands of miles above the reach of tide-water. The common-law definition of a navigable river [based on the ebb and flow of the tide] was unsuited to this state of things, and seems never to have been adopted in Pennsylvania.").

In Pennsylvania, for the purpose of determining state title to submerged lands and the scope of the public trust doctrine, “navigable waters” are waters that are navigable in fact.⁶² In 2001, in *Mountain Properties, Inc. v. Tyler Hill Realty Corp.*, the state Superior Court explained that “the rule for determining whether bodies of water are navigable is whether they are ‘used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes and trade and travel on water.’”⁶³ A body of water is not navigable if it is only used for recreation or tourism.⁶⁴ But if a portion of a river is navigable, its entire length is navigable.⁶⁵ The public’s rights in navigable waters extend to the high-water mark.⁶⁶

5.3 Recreational waters

In Pennsylvania, the public trust doctrine does not extend to recreational waters that are not navigable in fact.⁶⁷

5.4 Wetlands

Article 1, section 27 of the Pennsylvania Constitution provides a basis for state action to protect wetlands. In 1989, in *Appeal of Gaster*, the Commonwealth Court upheld the taking of a private wetland by the state Department of Transportation (DOT) for a wetland mitigation

⁶² *Cleveland & Pittsburgh Railroad Co. v. Pittsburgh Coal Co.*, 176 A. 7, 9 (Pa. 1935) (applying the navigable in fact test to rule that lands flooded by a federal dam became the property of the state).

⁶³ 767 A.2d at 1100 (Pa. Super. Ct. 2001) (quoting *Lakeside Park Co. v. Forsmark*, 153 A.2d 486, 487 (Pa. 1959)) (applying the navigable-in-fact test and concluding that a lake was non-navigable).

⁶⁴ *Id.* at 1100.

⁶⁵ *Lehigh Falls Fishing Club v. Andrejewski*, 735 A.2d 718, 722 (Pa. Super. Ct. 1999) (concluding that a portion of a river that ran through private property was navigable because the state Supreme Court previously determined that another portion was navigable. *Fulmer v. Williams*, 15 A. 726, 727 (Pa. 1888)).

⁶⁶ *Fulmer v. Williams*, 15 A. 726, 727 (Pa. 1888) (stating that the beds of navigable rivers “continue to be held and controlled by and for the public”). On navigable waters, a riparian landowner owns the land to the low-water mark. *Id.* at 727–28.

⁶⁷ See *Mountain Props., Inc.*, 767 A.2d at 1100 (limiting inquiry into the scope of the public trust doctrine to the navigable-in-fact test).

project.⁶⁸ The court explained that Article 1, section 27 “provides a rationale” supporting DOT’s condemnation of lands for wetland mitigation.⁶⁹ But when the state destroys wetlands, or when the state fails to prevent private parties from destroying wetlands, the *Payne* test, discussed above in section 3.3, sets a low bar for agency compliance with the amendment. As a result of *Payne*, private plaintiffs have not successfully used Article 1, section 27 to protect wetlands.

5.5 Groundwater

Compliance with state statutes and the *Payne* test,⁷⁰ discussed above in section 3.3, governs issues related to groundwater contamination from landfills and pollution discharges.⁷¹

5.6 Wildlife

Article, 1, section 27 of the Pennsylvania Constitution is the basis for several laws and regulations protecting wildlife.⁷² But plaintiffs have not successfully used Article, 1, section 27 to challenge governmental action regarding wildlife because the *Payne* test, discussed above in section 3.3, sets a low bar for agency compliance with the public trust doctrine.

5.7 Uplands (beaches, parks, highways)

In 2009, in *Belden & Blake Corp. v. Com., Dept. of Conservation and Natural Resources* (DCNR), the state Supreme Court ruled that a state agency could not prevent the owner of

⁶⁸ Appeal of Gaster, 556 A.2d 473, 478 (Pa. Commw. Ct. 1989) (citing *Shapp v. National Gettysburg Battlefield Tower, Inc.* 302 A.2d 886, 892, *aff’d*, 311 A.2d 588 (1973) for the rule that section 27 is “more than a declaration of rights not to be denied by government: it establishes rights to be protected by government,” and that because “the despoliation of the environment is an act to be expected ... from private persons . . . government must act in the people’s interest.”) (affirming the dismissal of an objection by a landowner to a declaration of taking of private wetlands by the Commonwealth Department of Transportation for a mitigation project).

⁶⁹ *Id.* at 477.

⁷⁰ *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976); *see supra* Part 1.0.

⁷¹ *Szarko v. Department of Environmental Resources*, 668 A.2d 1232, 1239, 1240. (Pa. Commw. Ct. 1995) (holding an agency’s permitting of a landfill did not violate Article I, section 27 because the agency followed all applicable laws and because the permit satisfied the *Payne* test).

⁷² *Com. v. Gavlock*, 964 A.2d 455 (Pa. Commw. Ct. 2008) (explaining that the conservation of “natural resources, such as elk, is an important common right enjoyed by all citizens and is protected by” the amendment and that the game code satisfies the Commonwealth’s trust obligation for preserving wildlife). *Id.* at 457 n.6.

subsurface oil and gas rights from entering state park lands to drill.⁷³ The Supreme Court reasoned that although DCNR had both a statutory duty to preserve state parks⁷⁴ and a constitutionally imposed fiduciary duty to conserve state parks as a public natural resource,⁷⁵ owners of subsurface interests had the same right to access their property beneath park lands as they did under privately owned lands.⁷⁶ Therefore, the public trust doctrine did not empower DCNR to condition either access to or drilling for privately owned subsurface oil and gas in state parks.⁷⁷

6.0 Activities Burdened

As discussed in sections 6.1 through 6.4, Pennsylvania courts view the public trust doctrine as a valid basis for legislative and administrative action.⁷⁸ However, under the *Payne* test, discussed in section 3.3, citizens have not successfully used the public trust to limit state action that harms the environment.

6.1 Conveyances of property interests

In 2009, in *In re Erie Golf Course*, an *en banc* panel of the Commonwealth Court ruled that the Donated or Dedicated Property Act (Act),⁷⁹ not the public trust doctrine, governed the conveyances of lands dedicated to a public purpose by the legislature.⁸⁰ When applying the Act to a conveyance, the court will defer to determinations made by the public entity wishing to

⁷³ 969 A.2d 528, 531, 532 (Pa. 2009).

⁷⁴ 71 PA. CONS. STAT. § 1340.303 (2008).

⁷⁵ PA. CONST. art. I, § 27.

⁷⁶ 969 A.2d at 532, 533 (citing *Chartiers Block Coal Co. v. Mellon*, 25 A. 597 (Pa. 1893)).

⁷⁷ *Id.* at 531.

⁷⁸ See John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part I—An Interpretive Framework for Article I, Section 27*, 103 DICK. L. REV. 693, 695, 696 (1999) (concluding that the Article 1, section 27 “has been realized more by the enactment and implementation of legislation and regulations addressing specific problems than by the Amendment itself”).

⁷⁹ 53 PA. CONS. STAT. §§ 3381–3386 (2008).

⁸⁰ 963 A.2d 612; *see supra* Part 3.1.

divest the lands.⁸¹ Taken together, the Act and judicial deference emasculate the public trust doctrine regarding conveyances.

6.2 Wetland fills

As discussed above in section 5.4, Article 1, section 27 of the Pennsylvania Constitution provides a basis for state action to protect wetlands. But when the state destroys wetlands, or when the state fails to prevent private parties from destroying wetlands, the *Payne* test, discussed above in section 3.3, sets a low bar for agency compliance with the amendment. As a result of *Payne*, private plaintiffs have not successfully used Article 1, section 27 to protect wetlands.

6.3 Water rights

Pennsylvania courts have not applied the public trust doctrine to water rights.⁸²

6.4 Wildlife harvests

Article, 1, section 27 of the Pennsylvania Constitution is the basis for several laws and regulations protecting wildlife.⁸³ But when private plaintiffs challenge the state's failure to protect wildlife under the amendment, the court will use the *Payne* test, discussed above in section 3.3, and defer to the agency. Therefore, plaintiffs have not successfully used the amendment to challenge governmental action regarding wildlife.

7.0 Public standing

Article 1, section 27 of the Pennsylvania Constitution, which guarantees a citizen's rights to a clean environment and requires the state to conserve natural resources, is self-executing.⁸⁴

⁸¹ 963 A.2d 613, 614. A challenge to *In re Erie Golf Course* will be heard by the Pennsylvania Supreme Court. *In re Erie Golf Course*, 971 A.2d 490 (Pa. 2009).

⁸² For Pennsylvania water statutes, see 27 PA. CONS. STAT. §§ 3101–3136 (2008) (governing water resources planning); 32 PA. CONS. STAT. §§ 631–641 (2008) (governing water rights).

⁸³ *Com. v. Gavlock*, 964 A.2d 455 (Pa. Commw. Ct. 2008) (explaining that the conservation of “natural resources, such as elk, is an important common right enjoyed by all citizens and is protected by” the amendment, and that the game code satisfies the Commonwealth’s trust obligation for preserving wildlife). *Id.* at 457 n.6.

⁸⁴ See *infra* part 7.3.

As explained below in section 7.1 through 7.3, this means citizens and the government may sue under the amendment to protect the environment.

7.1 Common law-based

Pennsylvania courts recognize standing for residents and taxpayers to sue a city or the state for alleged violations of the public trust doctrine.⁸⁵ In 1915, in *Board of Trustees of Philadelphia Museums v. Trustees of University of Pennsylvania*, the state Supreme Court ruled that when a governmental body has dedicated land to a public purpose “every citizen and taxpayer has an interest, not only by virtue of his being one of the public to whom the property has been donated but also by virtue of his contribution as a taxpayer.”⁸⁶

7.2 Statutory basis

Under Pennsylvania law, any person aggrieved by and with an interest in a state agency adjudication has the right to appeal the result of the adjudication in the Commonwealth Court.⁸⁷ The same right applies for any person aggrieved by and with an interest in a local agency adjudication.⁸⁸

7.3 Constitutional basis

⁸⁵ *Pilchesky v. Redevelopment Authority of City of Scranton*, 941 A.2d 762, 765 (Pa. Commw Ct. 2008) (finding standing under the public trust doctrine for a resident and taxpayer to sue a city when the city proposed to convey a sports complex to a university because the city formally dedicated the property for public use); *White v. Township of Upper St. Clair*, 799 A.2d 188 (Pa. Commw Ct. 2002) (finding standing for taxpayers and residents to sue a city over the construction of a telecommunications tower on publically owned land that had been dedicated to recreation, conservation, and historical purposes); *Board of Trustees of Philadelphia Museums v. Trustees of University of Pennsylvania*, 96 A. 123, 123 (Pa. 1915) (finding standing for taxpayers to sue a city to challenge the sale to a university of public museums built on public parks because there were city ordinances that dedicated the land to a public purpose, and because the city had “appropriated money for the care, maintenance and improvement of at least portions of the land in question”). *See also* *Pilchesky v. Doherty*, 941 A.2d 95, 101 (Pa. Commw. Ct. 2008) (finding standing for a taxpayer to sue the city over the proposed sale of a public golf course, but dismissing the case for failure to join the city and the purchaser of the golf course to the case).

⁸⁶ 96 A. at 123.

⁸⁷ 2 PA. STAT. ANN. § 702 (West 2008).

⁸⁸ 2 PA. STAT. ANN. § 752 (West 2008).

Article I, section 27 of the Pennsylvania Constitution is self-executing for citizens and for the state.⁸⁹ Therefore, both the Pennsylvania Attorney General⁹⁰ and individual citizens⁹¹ may sue to natural, scenic, historic, or aesthetic resources.⁹²

8.0 Remedies

As explained below in sections 8.1 through 8.3 and above in section 1.0, Pennsylvania courts have only once granted relief under the public trust doctrine since early interpretations of Article 1, section 27 of the state Constitution.

8.1 Injunctive relief

Since the Commonwealth Court established the *Payne* test in 1973, the only Pennsylvania court that granted an injunction under the public trust doctrine was the Commonwealth Court in *In re Conveyance of 1.2 Acres of Bangor Memorial Park to Bangor Area School Dist.*⁹³ *Bangor*, decided in 1989, was overruled twenty years later by *In Re Golf Course* in 2009.⁹⁴

8.2 Damages for injuries to resources

⁸⁹ *Payne v. Kassab*, 361 A.2d 263, 272 (stating that “the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn), and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad purposes and establish these relationships; the amendment does so by its own *ipse dixit*.”).

⁹⁰ *See* Com. by Shapp v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 594–6 (Pa. 1973) (J. Roberts concurring) & (Jones, J., dissenting) (denying the state an injunction to stop the construction of an observation tower, but supporting for Attorney General’s authority to bring a case under the amendment); *see supra* part 1.0.

⁹¹ *Payne v. Kassab*, 361 A.2d 263, 272, 273 (Pa. 1976) (finding standing for a coalition of residents and college students to sue the state Department of Transportation over a proposed road expansion, but denying plaintiff’s request for an injunction because the Commonwealth did not violate its trust duties under Article 1, section 27 of the Pennsylvania Constitution). *See supra* Part 1.0.

⁹² *But see* Bruhin v. Com., 320 A.2d 907 (Pa. Commw. Ct. 1974) (stating that the amendment was self-executing, but that “the Secretary of the Department of Environmental Resources [did not have] the primary responsibility of seeing to its enforcement.”)

⁹³ *In re Conveyance of 1.2 Acres of Bangor Memorial Park to Bangor Area School Dist.* 567 A.2d 750 (Pa. Commw. Ct. 1989), *overruled by* *In Re Golf Course*, 963 A.2d 605, 612 (Pa. Commw. Ct. 2009) (en banc), *appeal granted*, 971 A.2d 490 (Pa. 2009).

⁹⁴ *In Re Golf Course*, 963 A.2d 605, 612 (Pa. Commw. Ct. 2009) (en banc), *appeal granted*, 971 A.2d 490 (Pa. 2009).

No Pennsylvania court has awarded damages for a violation of the public trust doctrine.

8.3 Defense to takings claims

In 1989, in *Appeal of Gaster*, the Commonwealth Court stated that Article I, section 27 of the Pennsylvania Constitution “provides a rationale supporting the purpose of condemnation of lands” by the Commonwealth Department of Transportation to mitigate the loss of wetlands from road construction projects.⁹⁵ Section 27 does not, however, relieve the Commonwealth of its duty to provide just compensation when it takes private property.⁹⁶

⁹⁵ *Appeal of Gaster*, 556 A.2d 473, 478 (Pa. Commw. Ct. 1989) (citing *Shapp v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 892 (Pa. Commw. Ct. 1973), *aff'd*, 311 A.2d 588 (Pa. 1973) for the rule that section 27 is “more than a declaration of rights not to be denied by government: it establishes rights to be protected by government,” and that because “the despoliation of the environment is an act to be expected ... from private persons ... government must act in the people’s interest.”) (affirming the dismissal of an objection by a landowner to a declaration of taking by the Commonwealth Department of Transportation because the land was for a wetland mitigation project).

⁹⁶ *See Id.*