



**A Citizen's Guide To**

**Article I, § 27 of the Pennsylvania Constitution**

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## **SUMMARY**

Article I Section 27 of the Pennsylvania constitution 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.

Citizens often read this strong language as creating a separate, constitutional right that can be violated by activities that adversely impact air, water, natural, scenic, and historic resources in Pennsylvania. As a result, citizens may want to assert a claim under Art. I, § 27 as one ground for challenging permits or other decisions by state agencies. However, Pennsylvania courts are extremely reluctant to recognize such claims.

## **MORE-DETAILED GENERAL DESCRIPTION OF THE LAW**

A fair reading of § 27 is that it created a public trust in the state government to ensure the preservation of the state's natural resources. This means the state government is responsible for protecting Pennsylvania's environment on behalf of its citizens. The result is controlled development of the state's natural resources rather than no development at all. The job of the state is to balance the detrimental effects an activity would have on the environment against the social, economic, and environmental benefits gained. Thus, a decision, for example, to issue a permit allowing an activity which will result in some environmental harm looks like the Commonwealth is not living up to its § 27 responsibilities, and a constitutional claim should exist.

Courts considering a § 27 challenge to a state agency's actions apply a three-factor test first articulated in Payne v. Kassab, 312 A.2d 86 (Pa. Commw. Ct. 1973). The Payne test looks at the agency's action by trying to answer three questions:

- (1.) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- (2.) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- (3.) Does the environmental harm, which will result from the challenged decision or action, so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Although factors (2) and (3) suggest real possibilities for finding unconstitutional agency actions that result (or permit) environmental harms, the track record of § 27 claims is very poor. In fact, to date there have been no major case upholding a citizen's challenge to a state agency's decision as being unconstitutional. In all probability, this record is because

of the way the courts apply the Payne test. One can see this by looking at the judicial interpretations of the three factors.

### ***Compliance With All Applicable Laws***

Courts have interpreted the first Payne test factor narrowly, requiring only that the court first see if the state agency has authority over the activity, and if it does, ensuring the agency has followed all *applicable* laws.

Whether or not the state agency has authority over an activity can end a § 27 claim quickly. In Moosic v. Pennsylvania Public Utility Com., 429 A.2d 1237 (Pa. Commw. Ct. 1981), for example, citizens challenged the decision of the Pennsylvania Utility Commission (PUC) to allow the transfer of property to a developer who intended to use the land to build a ski resort. Despite the environmental implications of the transfer, there were simply no statutes that gave PUC the authority to complete an environmental review of the activity. Therefore, no § 27 claim existed.

In instances where a state agency does have authority over an activity, the agency is still limited by the factors listed in the applicable statutes, even when prominent environmental issues exist. Courts interpret the first Payne factor as asking only that a state agency follow all statutes and regulations that are applicable to the activity at issue. Thus, it is important to distinguish between all ‘applicable’ laws and all laws in general. For example, in Snelling v. Department of Transp., 366 A.2d 1298 (Pa. Commw. Ct. 1976), the opening of a barrier in the median of a highway was challenged as violating § 27 because the agency did not consider the environmental factors listed in a code. However, the challenge failed because the code section cited did not apply to the opening of medial barriers. In another case, the § 27 claim failed because the court found that the agency was not required to make an exhaustive review of all quality of life issues, only those mentioned in the applicable statute. Concerned Residents of the Yough v. Department of Env'tl. Resources, 639 A.2d 1265 (Pa. Commw. Ct. 1994)

What makes matters worse for those wishing to bring § 27 claims is that courts have shown a reluctance to go beyond the first factor of the Payne test. In other words, if the court finds that all applicable laws are followed so as to satisfy the first factor of the test, then courts generally will not even analyze the decision under the second or third prongs of the test, and instead uphold the agency’s decision. This often prevents the § 27 claimant from getting to the factors that would offer a greater chance to show a § 27 violation.

### ***Reasonable Effort to Reduce The Harm***

The second factor of the Payne test requires that all reasonable efforts have been made to ensure environmental incursions are at a minimum. Interpretation of this prong has done little to sway a decision in favor of upholding a challenge. A court will defer to the expertise of the state agency in charge to determine if all reasonable efforts have been made. If the state agency has already determined an activity is sufficient under this prong, it is extremely unlikely a court will second-guess the agency’s findings. See Butler

Township Bd. of Supervisors v. Commonwealth, Dep't of Environmental Resources, 513 A.2d 508 (Pa. Commw. Ct. 1986)

### ***The Harm/Benefit Balancing Test***

The third Payne factor would appear to prevent an activity if the environmental harm so clearly outweighs the benefit. However, judicial interpretation has made this prong relatively useless. In Concerned Citizens for Orderly Progress v. Commonwealth, Dep't of Environmental Resources, 387 A.2d 989 (Pa. Commw. Ct. 1978), the court made it clear that this balancing test does not just include environmental benefits, but social and economic benefits as well. This means a rather severe environmental harm could be outweighed solely by the economic benefit derived from the activity. Indeed, this can act as a double-edged sword: if a state agency denies a permit to a private company, the private company may challenge the decision on the grounds the agency did not properly consider all the benefits. Pa. Env'tl. Management Servs. v. Commonwealth, 503 A.2d 477 (Pa. Commw. Ct. 1986). Thus, far from supporting environmental protection, this third factor can be used to attack state agency decisions that protect the environment (like, for example, the denial of a permit) because of the failure to consider benefits. And, of course, this factor is still limited by the issues raised under the first factor—that is, the environmental issues raised must still be under the authority of the state agency and listed in the applicable laws.

### **CONCLUSION**

At first glance, Article I, Section 27 seems to allow a citizen to challenge any activity he or she may feel is a detriment to Pennsylvania's natural environment. Indeed, on its face the language of § 27 appears to promise as much. However, the Payne test and its subsequent interpretation means that courts have thus far interpreted the amendment in a narrow way such that the amendment merely makes the state responsible to ensure, through legislation, that the state's natural resources are protected. This has given the state the power to define exactly what section 27 is meant to protect and how it should be protected. Until a successful litigant can convince the courts to expand their view, § 27 challenges will likely not succeed.