

# Section 1 - General Guidance for Municipalities on the Environmental Rights Amendment

This section provides guidance concerning the Pennsylvania Supreme Court’s decision in Robinson Township, Delaware Riverkeeper Network, et al v. Commonwealth of Pennsylvania, which contained an extensive discussion of municipal obligations under Article I, Section 27 of the Pennsylvania Constitution (“Section 27”). The plurality’s thorough discussion of Section 27 principles re-affirms both municipal authority and *obligation* to act as trustee of the people’s public natural resources, and to respect the individual environmental rights of citizens. This section will summarize the Court’s analysis of Section 27, and outline how it could impact municipal decision making. At its core, the decision provides substantial weight to the argument that municipalities *must* comply with Section 27 and that municipalities are restrained from unduly infringing on the individual environmental rights of citizens, just as municipalities may not unduly infringe on private property rights.

Although only a plurality of justices signed the Court’s discussion concerning Section 27, the discussion is the most significant judicial pronouncement ever on Section 27. None of the other justices engaged in a substantive analysis of Section 27’s text contradicting the textual analysis the plurality provided. As a result, the plurality opinion is likely to be relied on or looked to as guidance by lower courts and citizens in further Section 27-based challenges.

## 1. The Plurality’s Textual Analysis of the Pennsylvania Constitution’s Environmental Rights Amendment

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.

In interpreting the plain language of Section 27, the Pennsylvania Supreme Court has explained that Section 27 has two components that may overlap at times. The first component is that of individual environmental rights, while the second is the public trust. We summarize each below.

### a. Individual Environmental Rights

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. —Art. 1, Sec. 27, cl.1

The first clause of Section 27 is a statement that the Pennsylvania Constitution protects individual environmental rights from governmental infringement. See, e.g., Pennsylvania Env’tl. Def. Found. v. Com. (“PEDF”), 108 A.3d 140, 157 (Pa. Commw. Ct. 2015), reargument denied (Feb. 3, 2015) (citing and quoting Robinson Twp., 83 A.3d at 953). The term “the people” translates to a right “personal to each citizen,” just as Article I, Section 8 has been interpreted to mean an individual right of privacy. Robinson Twp v. Commonwealth of Pennsylvania, 83 A.3d at 951 n.39. Thus, each citizen has an individual right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. The Pennsylvania Constitution protects these rights in the same way as all other inherent rights enshrined in Article I, including the right to free speech and property rights. Id. at 953-54.

“The corollary of the people’s Section 27 reservation of right to an environment of quality is *an obligation* on the government’s behalf to refrain from *unduly infringing* upon or *violating* the right, including by legislative enactment or executive action.” Robinson Twp., 83 A.3d at 952; *see also* PEDF, 108 A.3d at 156-57 (quoting 83 A.3d at 953). In other words, Section 27 protects individual environmental rights from undue governmental infringement, just like other rights such as free speech, due process, and property rights.

## b. Public Trust

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. —Art. I, Sec. 27, cls. 2 & 3.

Section 27 recognized a public trust over Pennsylvania’s public natural resources, and charged the Commonwealth *and* its political subdivisions, as trustees. *See, e.g., id.* at 951-52, 956-57, 977-78; PEDF, 108 A.3d at 171-72 (citizens entitled to expect that governmental officials will respect the Pennsylvania Constitution). As trustees, state and local governments are constrained to conserve and maintain public natural resources for the benefit of all Pennsylvania citizens, including generations yet to come. *Id.* at 954-59. PEDF, 108 A.3d at 171-72; Franklin Twp. v. Com., Dep’t of Env’tl. Res., 452 A.2d 718, 721-22 (Pa. 1982);<sup>1</sup> Cmty. Coll. of Delaware Cnty. v. Fox, 342 A.2d 468, 481 (Pa. Commw. Ct. 1975). Public natural resources, which form the body or corpus of the trust, include both publicly-owned resources such as state forest lands and local parks, and “those resources not owned by the Commonwealth, which involve a public interest,” which might include resources like groundwater. 1970 Pa. Legislative Journal-House, at 2271-72; *see also* PEDF, 108 A.3d at 167-68 (quoting and discussing Robinson Twp., 83 A.3d at 955).

As a trustee, municipalities have fiduciary duties that they owe to both present and future Pennsylvanians. PEDF, 108 A.3d at 157; Robinson Twp., 83 A.3d 956-57, 958-59, 977-78, 980-81 (plurality). “The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.” PEDF, 108 A.3d at 168 (quoting Robinson Twp., 83 A.3d 957). Two primary duties are “implicit” in the fiduciary relationship set forth by Section 27. These duties are both “prohibitory” and affirmative. Most notably, Section 27 *prohibits* government:

from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action. As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g., because of the state’s failure to restrain the actions of private parties. —PEDF, 108 A.3d at 157 (quoting Robinson Twp., 83 A.3d at 957-58)(emphasis added).

Section 27 also requires government “to act affirmatively to protect the environment, via legislative action.” *Id.*

As to present and future Pennsylvanians, who are the beneficiaries of Section 27’s public trust, state and local governments have fiduciary duties “to deal impartially with all beneficiaries and, second, . . . to balance the interests of present and future beneficiaries.” Robinson Twp., 83 A.3d at 959, 980-81; PEDF, 108 A.3d at 157 (quoting *id.* at 958-59). The duty of impartiality “means that the trustee must treat all equitably in light of the purposes of the trust,” which can touch on “questions of access to and distribution of public natural resources.”

<sup>1</sup> Adopted by Supreme Court majority in Susquehanna Cnty. v. DER, 458 A.2d 929, 931 (Pa. 1983).

Robinson Twp., 83 A.3d at 959; see also PEDF, 108 A.3d at 167. Further, to treat present and future beneficiaries equitably means to balance their interests; in other words, “the trustee cannot be shortsighted.” Robinson Twp., 83 A.3d at 959; PEDF, 108 A.3d at 157 (quoting *id.*)

## 2. What the Plurality’s Textual Analysis of Section 27 Means for Municipalities

The plurality’s textual analysis of Section 27 has several implications for municipalities. Most notably, the plurality made clear that Section 27 restricts municipalities from acting in ways that diminish public trust resources or unduly infringe on protected individual environmental rights. To comply with such constitutional restrictions on their authority municipalities must engage in pre-action environmental impact analyses to gauge the impact of a particular action on protected environmental rights and public natural resources. “Protection of environmental values . . . is a quintessential local issue that must be tailored to local conditions.” Robinson Twp., 83 A.3d at 979 (plurality).

At the same time, the plurality reinforced that Section 27 is not designed to end all development. It also emphasized that governmental entities may encounter situations that require a delicate balance between different rights protected under Article I of the Constitution. These issues are discussed more below.

### a. True Balance Required

Developers have often held municipalities accountable for enacting restrictive zoning ordinances that unduly limit development. In declaring such ordinances invalid, the courts have found that ordinances that unduly restrict development do not strike an appropriate balance. See, e.g., Main St. Dev. Grp., Inc. v. Tincum Twp. Bd. of Supervisors, 19 A.3d 21 (Pa. Commw. Ct. 2011); reargument denied (May 12, 2011), appeal denied 40 A.3d 123 (2012).

When we apply a balancing framework, we implicitly recognize that sometimes an ordinance might lean too far in one direction, and sometimes it might lean too far in another. While municipalities have not historically faced challenges that their ordinances go too far in allowing an unreasonable degradation of the environment, the *Robinson Township* decision supports the proposition that municipalities cannot simply allow unfettered development. See also PEDF, 108 A.3d at 170. As discussed further below, that means that municipalities could face challenges if they fail adequately balance conserving natural resources. See, e.g., Robinson Twp., 83 A.3d 901, 953-54, 960 (plurality).

Section 27 constrains governmental entities to exercise authority “in a manner that promotes sustainable property use and economic development.” PEDF, 108 A.3d at 157 (quoting Robinson Twp., 83 A.3d at 954). Given the genesis for Section 27, respect for individual constitutionally-protected environmental rights and public trust resources requires state and local decision making processes that consider and account for environment and public health impacts in advance. More broadly, Section 27 requires a shift to development that respects and sustains local health, local ecosystems, and local economies.

### b. Limitations on Municipal Action Unless Science-Based Decision Making Establishes that Action Will Not Cause Unreasonable Environmental Degradation

The plurality also discussed the obligations of governmental entities to engage in science-based decision making.<sup>2</sup> This fits with the spirit of Section 27, which requires a shift in decision making processes to sustainable development. In order to assess whether a particular course of action, piece of legislation, approval, or other decision raises a risk of a Section 27 violation, municipalities will need to incorporate into their decision making processes a science-based consideration of the impact of the course of action on individual environmental rights and public trust resources. The plurality explained that performing investigation and

<sup>2</sup> The Commonwealth Court’s discussion in PEDF reinforces this analysis. See, e.g., 108 A.3d at 156-57, 168, 172.

analysis in advance of acting, and taking seriously the outcome of those analyses, is part of the Constitutional obligation. This action is required to avoid claims that the municipality has infringed on each citizen's right to a clean, healthy environment, and to act as a trustee (a fiduciary) of the people's public natural resources.

To respect individual environmental rights, a governmental entity must evaluate in advance of acting whether a proposed course of action would unreasonably cause actual or likely degradation of the environment in violation of Section 27. Governmental entities must engage in science-based decision making to determine whether a proposed course of action will infringe on a citizen's constitutionally-protected environmental rights. This analysis must reasonably account for local conditions. As part of this science-based decision making, governmental entities must consider whether a proposed course of action would cause unreasonable "actual or likely degradation" of air or water quality, or other protected constitutional features, such as natural and scenic values of the environment. If a governmental entity fails to engage in science-based decision making or allows development to proceed that would cause unreasonable "actual or likely degradation," it raises a significant risk of a Section 27 challenge by citizens.

Further, as a trustee, local governments must consider before acting whether the proposed action (such as legislation or permitting) will lead to the "degradation, diminution, or depletion" of the people's public natural resources either now, or in the future. Likewise, the trustee must consider whether the proposed action places higher environmental burdens on some citizens than others. Such action would violate a trustee's duty of impartiality to treat the beneficiaries "equitably in light of the purposes of the trust.

The plurality stated, "The Environmental Rights Amendment offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term." Consequently, pre-action analyses must account for the range of present and future impacts of proposed activities or courses of action.

Under the plurality's textual analysis, these pre-action analyses must become a part of any decision making process that could impact environmental rights or public natural resources. As a result, analyses should be incorporated into zoning and land use decisions, including quasi-judicial determinations, as well as other areas such as open space, stormwater, and similar issues. Further, in enacting ordinances, municipalities should consider including statements in the whereas clause section acknowledging Section 27 obligations, and that a particular pre-action analysis was done in accordance with Section 27 to inform the language and approach in the ordinance. This can help protect a municipality both in challenges by developers, and by citizens who believe that a particular ordinance does not go far enough.

### c. Additional Themes and A Preview of Future Disputes

#### i. Local Considerations Matter

The Supreme Court affirmed that local conditions matter and must be considered when development is proposed for a property. In finding Sections 3303 and 3304 of Act 13 unconstitutional, the Court expressly found fault with the provisions' complete elimination of any local considerations, which traditionally has been accounted for at the local level via zoning. Robinson Twp., 83 A.3d at 977-982 (plurality); *id.* at 1004-08 (Baer, J., concurring). As the court recognized, local environmental considerations are a crucial part of environmental decision making in Pennsylvania that cannot be ignored without raising a significant risk of breaching trustee obligations. As the court stated:

In Pennsylvania, terrain and natural conditions frequently differ throughout a municipality, and from municipality to municipality. As a result, the impact on

the quality, quantity, and well-being of our natural resources cannot reasonably be assessed on the basis of a statewide average. Protection of environmental values, in this respect, is a quintessential local issue that must be tailored to local conditions. — *Id.* at 979 (plurality).

ii. Are municipalities restricted from allowing industrial development activity in non-industrial zoning districts?

With the shale gas boom, municipal officials have been pressured to allow industrial unconventional shale gas development in every zoning district. Municipal officials who allow industrial development in non-industrial zoning districts risk constitutional claims for violating citizens' due process rights and for violating citizens' rights under the Pennsylvania Constitution's Environmental Rights Amendment.

- *Allowing industrial development in non-industrial zoning districts exposes municipal officials to constitutional claims for violation of property owners' due process rights*

Allowing industrial uses in a non-industrial zoning district exposes municipal officials to claims that they have violated constitutional due process guarantees.

The Pennsylvania and United States Constitutions require that for any zoning to be constitutional it must promote the public health, safety, morals, or welfare, and be substantially related to the protecting or furthering that interest. *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 728 (Pa. 2003); *C & M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143, 150 (Pa. 2002); *Boundary Drive Associates v. Shrewsbury Twp. Bd. of Sup'rs*, 491 A.2d 86, 90 (Pa. 1985). "Lawful zoning must be directed toward the community as a whole, concerned with the public interest generally, and justified by a balancing of community costs and benefits." *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 729 (Pa. 2003). A municipality violates its constitutional obligations if it fails to balance citizens' sometimes competing constitutional rights to the use and enjoyment of property – both of those who would develop their properties, and those who wish to protect theirs. Article I, Section 1 of the Pennsylvania Constitution. *Robinson Twp.*, 83 A.3d at 1007-08 (Baer, J., concurring); *Robinson Twp. v. Com.*, 52 A.3d 463, 484-85 (Pa. Commw. Ct. 2012) *aff'd in part, rev'd in part sub nom. Robinson Twp., Delaware Riverkeeper Network, et al. v. Com.*, 83 A.3d 901 (Pa. 2013).

Allowing new industrial uses in a non-industrial zoning district could be the basis for a claim that municipal officials are violating these due process principles. Such municipal action injects uses that are incompatible with the purpose of the zoning district, thereby upsetting the established expectations of those who live there. See *Robinson Twp., Delaware Riverkeeper Network, et al. v. Com.*, 83 A.3d 901, 979 (Pa. 2013)(plurality); *id.* at 1004-05, 1006-07 (Baer, J., concurring); *Robinson Twp. v. Com.*, 52 A.3d 463, 484-85 (Pa. Commw. Ct. 2012) *aff'd in part, rev'd in part*, 83 A.3d 901 (Pa. 2013). Industrial uses, with detrimental impacts on health, safety, welfare, property values, and public natural resources, do not fit into zones set aside for other types of uses, including residential uses and conservation of natural resources for future generations. See *Robinson Twp. v. Com.*, 52 A.3d 463, 484-85 (Pa. Commw. Ct. 2012) *aff'd in part, rev'd in part*, 83 A.3d 901 (Pa. 2013). By allowing industrial operations in areas set aside for non-industrial land uses, a municipality exposes itself to claims that it has failed to further the very purposes underlying the non-industrial zoning district, and makes the district irrational.

To illustrate, allowing a new asphalt plant, a surface coal mine, or a quarry into an agricultural zone would destroy soils set aside for agriculture and would increase the risk of water contamination and depletion. In agricultural zones, water resources are important for irrigation, livestock, and drinking water. Such new

industrial land uses would also bring truck traffic, dust, and the risk of industrial accidents that could threaten the lives and livelihoods of those who live and work nearby.

Similarly, placing a refinery in an open space zone would upset the expectation that the zone will be set aside for resource protection, recreation, and/or scenic values. Further, those who moved into the zone, and invested in their properties with the expectation that the surrounding land uses would be compatible would now face a situation in which their investments are diminished more so than their neighbors who happen not to live next to the property where the incompatible use is allowed. Robinson Twp., Delaware Riverkeeper Network, et al. v. Com., 52 A.3d at 484-85 (Pa. Commw. Ct. 2012) aff'd in part, rev'd in part, 83 A.3d 901 (Pa. 2013).

Likewise, allowing an unconventional gas well into a residential zone would bring non-stop lighting, flaring, truck traffic, dust, noise, chemical emissions, and other materials that disrupt the zone's purpose of being set aside for quiet, low-traffic areas where children can play, and people can rest after a hard day's work. See Robinson Twp., 83 A.3d at 1005 (Baer, J., concurring).

Protestants can argue that allowing incompatible uses together makes the zoning classifications arbitrary, undermines the rationality of the ordinance, and is therefore vulnerable to constitutional challenge. It is irrational to allow an incompatible land use in a zone that was established to achieve a non-industrial character, development and conservation goals. Id.; Robinson Twp., 83 A.3d at 1005, 1007-08 (Baer, J., concurring).

- *Allowing industrial development in non-industrial zoning districts exposes municipal officials to legal challenge for violating the Pennsylvania Constitution's Environmental Rights Amendment*

Allowing industrial uses, such as unconventional shale gas development, in a non-industrial zoning district exposes municipal officials to claims that they have violated the Pennsylvania Constitution's Environmental Rights Amendment.

Municipalities have constitutional obligations to respect their citizens' constitutional right to "an environment of quality" and their constitutional "right to benefit from" their public natural resources. Pa. Const. Article I, Section 27; Robinson Twp., Delaware Riverkeeper Network, et al. v. Com., 83 A.3d 901, 976 (Pa. 2013). Municipal officials also have fiduciary duties as trustees of the public's public natural resources "to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g., because of the state's failure to restrain the actions of private parties." Robinson Twp., 83 A.3d at 957 (plurality); see also PEDE, 108 A.3d at 157 (quoting same).

In Robinson Township, the Supreme Court struck down a state law that would have placed industrial activity in every zoning district in every municipality. In reaching this holding, the Court stated, "a new regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district [including residential and agricultural] is incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life." Robinson Twp., 83 A.3d at 979.

Placing industrial uses in areas designated for non-industrial uses exposes municipal officials to claims that they have allowed the unreasonable degradation of the local environment in which people live, work, and recreate, including the public natural resources on which people rely. It does so by exposing "otherwise protected areas to environmental and habitability costs associated with this particular industrial use: air, water, and soil pollution; persistent noise, lighting, and heavy vehicle traffic; and the building of facilities incongruous with the surrounding landscape." Robinson Twp., 83 A.3d at 979. In addition, "some properties and communities will carry much heavier environmental and habitability burdens than others" by virtue of the haphazard placement

of industrial operations. *Id.* at 980. “This disparate effect is irreconcilable with the express command that the trustee will manage the corpus of the trust for the benefit of ‘all the people.’ Pa. Const. Art. I, § 27.” *Id.*

The *Robinson Township* decision supports the proposition that municipalities cannot simply allow unfettered development. Municipalities must balance development against conserving the natural resources. The courts will strike down municipal zoning ordinances that do not strike an appropriate balance. *Main St. Dev. Grp., Inc. v. Tincum Twp. Bd. of Supervisors*, 19 A.3d 21 (Pa. Commw. Ct. 2011); *reargument denied* (May 12, 2011), *appeal denied* 40 A.3d 123 (2012). Municipalities must balance competing interests and cannot favor some to the exclusion of others. *See, e.g., Robinson Twp.*, 83 A.3d 901, 953-54, 960 (plurality). Allowing industrial development throughout a municipality exposes local officials to claims that they have failed to conduct the constitutionally-required balancing.

Such a failure exposes municipalities and their officials to a legal challenge for violation of citizens’ constitutional environmental rights. *Robinson Twp.*, 83 A.3d at 951-52, 956-57, 974-75, 977-78. The plurality in *Robinson* recognized that the rights guaranteed in the Environmental Rights Amendment are on a par with our other inherent political rights, including our private property and free speech right and that just as citizens may vindicate those political rights in the courts, citizens may also vindicate their rights and hold government officials accountable under the Environmental Rights Amendment. *Id.* at 951-54, 956-57, 974-75, 977-78; *PEDF*, 108 A.3d at 156 (quoting *id.* at 950-51).

### **3. Are Municipalities Obligated — Before Acting — To Determine Whether the Proposed Action Will Cause an Unreasonable Degradation of Our Air and Water?**

Municipalities may face claims that the Pennsylvania Constitution limits government officials from acting when they have not determined in advance whether the proposed activity will cause an unreasonable degradation of our environment.

Under the plurality’s textual analysis of Section 27, state and local government officials have an obligation to assess whether any proposed project, law, regulation or ordinance would cause unreasonable “actual or likely degradation” of air or water quality, or other protected constitutional features, such as natural and scenic values of the environment. *Robinson Twp. v. Com.*, 83 A.3d 901, 951-955 (Pa. 2013)(plurality); *Pennsylvania Env’tl. Def. Found. v. Com.*, 108 A.3d 140, 156 (Pa. Commw. Ct. 2015), *reargument denied* (Feb. 3, 2015). If a governmental entity fails to perform the analysis, or allows development to proceed that would cause unreasonable “actual or likely degradation,” it raises a significant risk of a Section 27 challenge by citizens. *Robinson Twp.*, 83 A.3d at 952 (“The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists a priori to any statute purporting to create a cause of action.”); *see also id.* at 951 (stating that clause 1 “implicates a holistic analytical approach to ensure both the protection from harm or damage and to ensure the maintenance and perpetuation of an environment of quality for the benefit of future generations.”); *see also PEDF*, 108 A.3d at 156, 172.

Further, as a trustee, government officials must consider before acting whether the proposed action will lead to the “degradation, diminution, or depletion” of the people’s public natural resources either now, or in the future. *Id.* at 952, 957, 959 & n.46; *see also id.* at 959 n.45, 20 Pa.C.S. § 7203(a) & (c)(5); *PEDF*, 108 A.3d at 157, 168; *In re Scheidmantel*, 868 A.2d 464, 492 (Pa. Super. Ct. 2005) (“trustee’s action must represent an actual and honest exercise of judgment predicated on a genuine consideration of existing conditions”); 20 Pa.C.S. § 7773. Likewise, government officials must consider whether the proposed action places higher environmental burdens on some citizens than others, which would violate a trustee’s duty of impartiality to treat the beneficiaries “equitably in light of the purposes of the trust.” *Robinson Twp.*, 83 A.3d at 957, 959, 980; *PEDF*, 108 A.3d at 157 (quoting *id.* at 958-59). Section 27 specifically establishes a preference for protecting the natural quality of

the environment and its benefits over development and disturbance, requiring that the government officials take the same focus and care in their actions. Robinson Twp., 83 A.3d at 973 n.55.

As a trustee, municipalities have fiduciary duties that they owe to both present and future Pennsylvanians. PEDF, 108 A.3d at 157; Robinson Twp., 83 A.3d 956-57, 958-59, 977-78, 980-81. “The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.” PEDF, 108 A.3d at 168 (quoting Robinson Twp., 83 A.3d 957). Two primary duties are “implicit” in the fiduciary relationship set forth by Section 27. These duties are both “prohibitory” and affirmative. Most notably, Section 27 *prohibits* government:

from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action. As trustee, the Commonwealth has a *duty to refrain from permitting or encouraging* the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through *direct* state action or *indirectly*, e.g., because of the state’s failure to restrain the actions of private parties. —PEDF, 108 A.3d at 157 (quoting Robinson Twp., 83 A.3d at 957–58)(emphasis added).

The plurality further noted that Section 27 requires government “to act affirmatively to protect the environment, via legislative action.” Id.

When a governmental body takes action that implicates fundamental rights, such as the rights enshrined in Section 27, such action will face strict constitutional scrutiny. As the Montana Supreme Court stated the standard under its similar constitutional provision, “a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana’s Constitution, and ... any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State’s objective.” Montana Env’tl. Info. Ctr. v. Dep’t of Env’tl. Quality, 296 Mont. 207, 225, 988 P.2d 1236, 1246 (Mont. 1999).

#### **4. Conclusion**

“[W]hen government acts, the act must, on balance, reasonably account for the environmental features of the affected locale ... if it is to pass constitutional muster.” Robinson Twp., 83 A.3d at 953. This duty, which derives directly from the text of our Constitution’s Declaration of Rights, must guide municipal decision making into the future.

