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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 2609 C.D. 2015

DELAWARE RIVERKEEPER NETWORK, *et al.*,

Appellants,

v.

MIDDLESEX TOWNSHIP ZONING HEARING BOARD, *et al.*,

Appellees.

BRIEF OF *AMICUS CURIAE* PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY

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The Pennsylvania Chamber of Business and Industry ("Chamber") submits this brief as *amicus curiae* pursuant to Pa.R.A.P. 531(b)(1)(i).

I. STATEMENT OF *AMICUS CURIAE'S* INTERESTS

The Chamber is the largest, broad-based business association in Pennsylvania. It has thousands of members throughout Pennsylvania, who employ more than 50 percent of the Commonwealth's private workforce. The Chamber's mission is to improve Pennsylvania's business climate and increase the competitive advantage for its members while, at the same time, ensuring that the natural environment is protected.

In this case, Appellants (the "Riverkeeper") challenge a township zoning ordinance amendment ("Ordinance") permitting oil and gas development in certain zoning districts (subject to numerous substantive and procedural requirements). The Riverkeeper argues that the Ordinance, by permitting oil and gas development in more zoning districts than before, violates Article I, §§ 1 and 27 of the Pennsylvania Constitution. The township's zoning board, the trial court, and this Court all rejected the Riverkeeper's constitutional challenges to the Ordinance.

On August 3, 2018, our Supreme Court remanded this Court's decision for reconsideration in light of its subsequent opinions in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF*") and *Gorsline v. Bd. of Sup. of Fairfield Twp.*, 186 A.3d 375 (Pa. 2018).

Chamber members regularly apply for zoning authorizations from municipalities for a wide variety of activities. Thus, the Chamber has substantial interest in the Court's disposition of several issues presented by this appeal, including whether, as the Riverkeeper incorrectly suggests, (1) Article I, § 1 protects a neighboring landowner's "expectations" about how someone else's private property is, or should be, zoned, (2) the township breached its fiduciary duty as a "trustee" under Article I, § 27 by allowing oil and gas development within additional zones, and (3) the Ordinance itself violates rights protected by Article I, § 27 by allowing such development.

II. SUMMARY OF ARGUMENT

Neighbors do not have a constitutionally-protected right in their "expectations" about how someone else's private property is, or should be, zoned. Unless use of one's own property is prohibited or restricted, a zoning change does not deny life, liberty or property and, thereby, trigger a right to due process of law. A person's expectations that the neighborhood will always stay the same are not protected by the constitution. Concluding otherwise trivializes Pennsylvania's Declaration of Rights and ensures endless litigation grounded in perceived constitutional grievances.

The Riverkeeper has taken reasoning developed in cases brought by landowners whose use of private property has been *prohibited or restricted* by

zoning – and who do have constitutionally-protected property rights – and misapplied it to cases brought by neighbors whose property use is not similarly prohibited or restricted. The proponents of this legal legerdemain fail to address the very fundamental question of how, or why, the Pennsylvania Constitution actually protects so-called "zoning expectations." When this fundamental question is addressed, it becomes obvious that there is no such protection.

The same can be said for the glossy, but incompletely reasoned, arguments sprouting from recent decisions regarding Article I, § 27. The Riverkeeper argues that municipalities have a "fiduciary duty" to consider the impact of their actions on the "air," which the Riverkeeper contends is property held in trust by the Commonwealth. Thus, if a municipality does not study the potential impacts of its actions on the "air," then the municipality can be hauled into court.

The Riverkeeper's validity challenge to the Ordinance should be rejected given this Court's decision in *Frederick v. Allegheny Twp. Zoning Hearing Board*, 196 A.3d 677 (Pa. Cmwlth. 2018). This case, however, also provides this Court with an opportunity to address important, threshold questions left unanswered by its *Frederick* decision and to introduce reasonable limits on the application of Article I, § 27, thus saving zoning boards and lower courts from being inundated with constitutional claims based on alleged failures to inadequately consider impacts on the air, water or scenery. The Court can begin this process by affirmatively

addressing a threshold question: Does Article I, § 27 obligate municipalities to adopt zoning ordinances? If this Court finds that the Ordinance violates Article I, § 27, then it has necessarily concluded that the answer is yes. This is because, in the absence of constitutional obligation to zone, an ordinance that is insufficiently restrictive cannot violate Article I, § 27.

At an even more basic level, this Court has an opportunity to address the still open question of whether Article I, § 27 is ever implicated by zoning. In this regard, Article I, § 27 should not be interpreted to create or reallocate private property rights. It should not be read to take away a landowner's right to make otherwise lawful use of his private property so that the neighbor can realize some type of individual, environmentally-focused benefit.

If Article I, § 27 were interpreted as the Riverkeeper advocates, it would raise serious concerns that it had effectuated an uncompensated taking of private property, in violation of the Fifth Amendment to the U.S. Constitution. The Court should reject an interpretation of Article I § 27 that necessarily engenders a taking of private property rights, which cannot be the result intended when Pennsylvanians adopted the amendment.

III. ARGUMENT

The Court should reject the Riverkeeper's constitutional arguments for several straightforward reasons. As with any constitutional analysis, this Court should determine whether there are constitutional rights at stake and, if so, whether the state has taken action to deprive constitutional rights. The Ordinance does not violate substantive due process rights under Article I, § 1 of the Pennsylvania Constitution because neighboring landowners do not have constitutionally-protected rights in their "zoning expectations" about how others use their private property.

The Ordinance also does not violate Article I, § 27 of the Pennsylvania Constitution because: (1) the township is not the "Commonwealth" for purposes of Article I, § 27; (2) neither the private property at issue nor the "air" above it are the Commonwealth's "public natural resources" and, therefore, they are not part of the "trust" under Article I, § 27; and (3) the Ordinance does not infringe upon any purported rights to a decent environment under Article I, § 27.

A. The Ordinance Does Not Violate Article I, § 1.

The rights afforded under Article I, § 1 of the Pennsylvania Constitution are generally coextensive with the federal due process clause of the 14th Amendment of the U.S. Constitution, which provides no state shall deprive any person of life, liberty, or property, without due process of law. *See Pa. Game Comm'n v. Marich*, 666 A.2d 253, 255 & n.6 (Pa. 1995); *Robbins v. Cumberland Cnty. Children & Youth*

Servs., 802 A.2d 1239, 1252 (Pa. Cmwlth. 2002).

"[F]or substantive due process rights to attach there must first be the deprivation of a property right or other interest that is constitutionally protected." *Khan v. State Bd. of Auctioneer Exam'rs*, 842 A.2d 936, 946 (Pa. 2004).

With those basic principles in mind, there is no viable substantive due process claim here because neighbors do not have a constitutionally-protected right in their "expectations" about how someone else's private property is, or should be, zoned.

1. Pennsylvania's Constitution Does Not Protect A Neighbor's Zoning "Expectations."

While Pennsylvania's courts have recognized that property owners have a constitutionally protected right to enjoy "***their*** property," *see, e.g.*, *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 727 (Pa. 2003) (emphasis added), no court has held that neighbors have constitutional protection against changes in treatment of adjoining tracts of property under properly-adopted land use ordinances. That is, no court has held that neighbors have a constitutionally-protected right in their "expectations" about how ***someone else's*** private property is, or should be, zoned.

Relevant decisions from the U.S. Supreme Court and the courts of this Commonwealth demand the conclusion that a neighbor has no constitutionally-protected right in their "expectations" about how someone else's private property is,

or should be, zoned. The U.S. Supreme Court has written that in order to have a constitutionally-protected property right in something,

> a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In other words, as the Pennsylvania Supreme Court has said, a vested right "must be something more than a mere expectation, based upon an anticipated continuance of existing law. It must have become a title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption from a demand made by another." *Konidaris v. Portnoff Law Assocs., Ltd.*, 953 A.2d 1231, 1242 (Pa. 2008).

The Riverkeeper's Article I, § 1 challenge to the Ordinance is, at bottom, premised upon nothing more than a reliance on the continued existence of the existing township zoning ordinance coupled with a mere expectation that no change would be made to that ordinance that the Riverkeeper does not like. Such expectations are simply not, in light of basic principles of federal and state law, sufficient to establish the existence of a constitutionally-protected property interest of the type needed to support the Riverkeeper's substantive due process challenge to the Ordinance.

Based on the principles discussed above, our Supreme Court has held that a property owner has no vested right in a municipality's maintenance of zoning restrictions on his neighbor's property. In *Hollearn v. Silverman*, 12 A.2d 292 (Pa. 1940), certain property owners brought an action against the owner of an adjoining property and the officers of a municipality, seeking to restrain them from amending a zoning ordinance to change the classification of the adjoining owner's property from residential to commercial. In sustaining a dismissal of the action, our Supreme Court explained that the plaintiffs had "no vested right" to insist that the classification be maintained as residential. *See Hollearn*, 12 A.2d at 293 (citing *Ayars v. Wyoming Valley Homeopathic Hospital*, 118 A. 426 (Pa. 1922)).

Our Superior Court, likewise, has recognized that a property owner has no vested right in a municipality's maintenance of zoning restrictions on his neighbor's property. In *In Re Lieb's Appeal*, 116 A.2d 860 (Pa. Super. 1955), a neighbor's action against a zoning amendment to commercial was dismissed. The Superior Court flatly rejected the neighbor's "vested right" attack on the zoning amendment, explaining:

> ***[T]he appellant is not the owner of the land in question and has no such rights in it. He had no vested right which would prevent the borough from subsequently amending the ordinance*** of 1926.
> . . .
>
> ***The amending ordinance which does not take away rights of the owner of land to use it, but returns to him use rights which had previously been taken from him, does not involve "intermeddling with***

> ***the private ownership of property" and is, therefore, not subject to the same strict tests as the original ordinance would have been if tested by the then owner of the tract in question***. *Lord Appeal*, *supra*.

Lieb's Appeal, 116 A.2d at 865-66 (emphasis added).

2. The Riverkeeper Has No "Vested Right" To Prevent Zoning Ordinances That Allow Additional Uses.

Despite those settled principles, the Riverkeeper suggests that the concept of vested rights gives a neighboring landowner a right to prevent the use by *other* owners of *their* property for such purposes as are legally permissible, including for example a new land use that is authorized in an existing zone. The Riverkeeper is wrong for three reasons.

First, the Riverkeeper has it backwards. As it applies to zoning, or rezoning, the theory of vested rights relates only to a property owner's rights to prevent his *own* property from being rezoned so as to *prohibit* a particular use, after he has commenced the operation of that use on his *own* property, pursuant to a prior zoning ordinance. *See, e.g.*, *Gulf Oil Corp. v. Township Bd. of Supervisors*, 266 A.2d 84, 86 (Pa. 1970); *Shapiro v. Zoning Board of Adjustment*, 105 A.2d 299, 303 (Pa. 1954). This well-established principle of vested rights does not give a landowner a right to prevent the use by *other* owners of *their* property for such purposes as are legally permissible.

Second, the exercise of the police power is not a contract. In enacting a zoning ordinance, a municipality is engaged in legislating, not contracting. *See Hollearn*,

12 A.2d at 293; *Ayars*, 118 A. 426; *Lieb's Appeal*, 116 A.2d at 865. As a consequence, a zoning ordinance that fixes zoning boundaries does not result in a contract between the relevant municipality and property owners that precludes the municipality from subsequently changing the boundaries if it deems the change to be desirable. A zoning ordinance, moreover, does not vest in a property owner a right to prevent the restrictions that it imposes on his property, or the property of others, from remaining unaltered.

The U.S. Supreme Court's decision in *Reichelderfer v. Quinn*, 287 U.S. 315 (1932), also helps to illustrate this point. In *Reichelderfer*, the owners of residential properties sought to enjoin construction of a fire house on land near their properties previously designated as a park. The adjoining property owners contended they had a valuable right to have the adjoining land used for park purposes and claimed that the statute constituted a taking of their properties without due process of law and just compensation by directing its use for other purposes. The U.S. Supreme Court flatly rejected this contention and stated that "zoning regulations are not contracts by the government and may be modified by Congress." *Id*. at 319, 323.

The arguments rejected in *Hollearn* and *Reichelderfer* are similar to those the Riverkeeper is making here. As in those cases, the doctrine of vested rights may be invoked only if a property owner, in reliance on the applicable zoning ordinance, has commenced a use on his *own* property before the ordinance was changed. A property

owner has no vested right in the maintenance of the zoning ordinance with regard to *other* peoples' property. The Riverkeeper has no vested right in preventing the township's zoning ordinance from being amended so as to allow oil and gas development to be located on other peoples' properties, where such development may not have been allowed before.

Finally, an affected landowner has a remedy to address neighboring land uses that cause harm that does not require a constitutional challenge to the ordinance authorizing that land use. If a neighboring landowner "constructs a nuisance on his property, the zoning ordinance will not save him; an [affected property owner] will then have their remedy." *Hollearn*, 12 A.2d at 294. *See also Ayars*, 118 A. at 427 ("We cannot assume that defendant will make itself a nuisance sometime in the future, or continue the injunction to meet such a possibility."). Thus, the state constitution does not give the Riverkeeper and landowners an avenue to obtain relief if neighboring if activities on neighboring properties cause harm. Their common-law remedies suffice.

Accordingly, the Court should reject the Riverkeeper's argument that substantive due process under Article I, § 1 of the Pennsylvania Constitution protects a neighboring landowner's "expectations" about how someone else's private property is, or should be, zoned.

B. The Ordinance Does Not Violate Article I, § 27.

Having determined that the Ordinance does not implicate substantive due process rights under Article I, § 1 in any way, the question becomes whether the Ordinance or the township's enactment of the Ordinance violates Article I, § 27 in light of our Supreme Court's decision in *PEDF*. The answer is no.

1. Municipalities Are Not The "Commonwealth" For Purposes Of Article I, Section 27.

As a threshold matter, municipalities are not the "Commonwealth" for purposes of Article I, § 27 and, consequently, do not have constitutionally-mandated "trustee" obligations under that provision, despite suggestions to the contrary in *dicta* in *PEDF*. *See* 161 A.3d at 931 n.23.

In interpreting provisions of the Pennsylvania Constitution, "[o]ur ultimate touchstone is the actual language of the constitution itself." *Buckwalter v. Borough of Phoenixville*, 985 A.2d 728, 730 (Pa. 2009), *quoting Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008). Also, "because the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible." *Cavanaugh v. Davis*, 440 A.2d 1380, 1382 (Pa. 1982).

The Pennsylvania Constitution, when viewed as a whole, clearly differentiates between the "Commonwealth" – *i.e.*, "The Legislature," "The Executive," and "The Judiciary" – and local municipalities. *See, e.g.*, Pa. Const. art. I, § 26, art. II, § 1, art. III, § 31, art. IV, §1, art. V, §§ 1 & 2, art. VIII, § 2(b)(ii), art. VIII, § 4, art. VIII,

§ 9, art. VIII, § 16. The Pennsylvania Constitution, in fact, contains an entire article, Article IX, that is devoted to "Local Government," *see* Pa. Const. art. IX, which is separate from Articles II, IV, and V, which are devoted to the Legislative, Executive, and Judicial Departments, respectively. As Article IX expressly provides, a "municipality," is a unit of government "*created by* the General Assembly." Pa. Const. art. IX, § 14 (emphasis added).

Simply put, there is nothing in the text of Article I, § 27 or a proper interpretation of the text that suggests local government units are "the state" for purposes of preserving any rights or carrying out any duties regarding the Commonwealth's public natural resources. Municipalities are confined to their powers and duties as prescribed by the General Assembly. As this Court has already held, Article I, § 27 does not create in municipalities new powers or obligations regarding the Commonwealth's public natural resources beyond the powers bestowed upon them by statute. *See Frederick*, 196 A.3d at 697.

2. The Township Did Not Breach Alleged Fiduciary Duties Under Article I, Section 27 Because No "Public Natural Resources" Are Involved.

Even assuming a municipality is the "Commonwealth" for purposes of Article I, § 27, a zoning ordinance that merely states where certain land uses can take place on private property within a township does not concern *the Commonwealth's* "public natural resources."

"Public natural resources" are the *property interests* that the Commonwealth owns in natural resources. *See* Robert E. Woodside, Pennsylvania Constitutional Law (1985) at 176 ("Article I, Section 27 expands [the] public trust doctrine beyond the navigable waters. The Commonwealth owns vast areas of forest land, parks, highways and other real estate, as well as rights in lakes and rivers, which are 'public natural resources' to be 'conserved and maintained' by the state as trustee for all the people. This is an interest in *property* and the proper subject of a trust.") (emphasis in original).

Indeed, using a possessive noun, Article I, § 27 refers to "Pennsylvania***'s*** public natural resources[.]" (Emphasis added). The use of the possessive form signals that "public natural resources" are things that the Commonwealth ***owns***. Article I, § 27 then states that the "public natural resources" are the "common ***property*** of all the people[.]" (Emphasis added). Synthesizing these points reveals that "public natural resources" are "property" interests that the Commonwealth owns in natural resources.

Nevertheless, the Riverkeeper argues that the "air" is part of the corpus of the public trust such that municipalities have fiduciary duties to protect it. But our Supreme Court, in *PEDF*, effectively rejected the Riverkeeper's argument that the Commonwealth's "public natural resources" – the corpus of the trust – includes the

air, water, scenery, wild animals or similar things that are incapable of being owned and transferred and, thus, cannot be the subject matter of a trust.

In *PEDF*, a majority of our Supreme Court, over two dissenting opinions, concluded that "*private trust principals* provide this Court with the necessary tools to properly interpret the trust created by Section 27." *PEDF*, 161 A.3d at 934 n.26 (emphasis added).[1] Given that clear edict by the *PEDF* majority opinion, the air, water in a stream (as distinguished from the right to take water), scenery, wild animals at large (as distinguished from the right to capture such animals), and similar things are not legally capable of being owned and transferred and hence are not things with any property interest that can be made the subject matter of a trust. *See*, *e.g.*, Restatement (Second) of Trusts, §§ 74-79 (trust res must be a property interest, and one that is subject to transfer). "Any property which can be *voluntarily transferred* by the *owner* can be held in trust." *Id*. at § 78 (emphasis added). On the other hand, something that cannot be owned and transferred cannot be held in trust. *Id*. at § 79.

Thus, while the state may have *sovereign* control over the "air" or "water" in a regulatory, supervisory sense, it does not own them in a possessory, *proprietary*

[1] The dissenting opinions in *PEDF* both concluded that Article I, Section 27 is an embodiment of the common law public trust doctrine, as it applied to natural resources at the time of the amendment, to which private trust principles should not be applied. *See PEDF*, 161 A.3d at 945 (Baer, J., dissenting), 949 (Saylor, C.J., dissenting).

sense such that the "air" or "water," or more generally, the "environment," can be made the *res* of a trust under the "private trust principals" our Supreme Court concluded must be applied to "interpret the trust created by Section 27." Courts in other states agree. *See, e.g.*, *State v. Superior Court of Riverside Cnty*., 93 Cal. Rptr. 2d 276, 285-87 (Ct. App. 2000) (statute declaring all waters to be the property of the people indicative of the state's sovereign control of water resources and not proprietary ownership); *Walbridge v. Robinson*, 125 P. 812, 814 (Idaho 1912) (state's interest in water is not "in the proprietary sense, but rather in the sovereign capacity as representative of all the people for the purpose of guaranteeing that the common rights of all are protected ..."); *Willey v. Decker*, 73 P. 210, 221-22 (Wyo. 1903) (expression that water is property of public denotes state's sovereignty over the resource as a representative of the people and does not indicate proprietary owner).

Moreover, and assuming *arguendo*, that the "air" or "water" can be made the *res* of a trust under the "private trust principals," then there are takings implications. The state cannot, through constitutional interpretation, commandeer private property interests and place them into a public trust. As the courts have recognized, a landowner has a *proprietary* ownership interest in the superadjacent airspace above his private property, while the government does not. In addressing this point, the U.S. Supreme Court explained that "the landowner, as an incident to his ownership,

has a claim to [the superadjacent airspace]" and "invasions of it are in the same category as invasions of the surface" for purposes of determining whether the government has accomplished a "taking" of private property under the Fifth Amendment to the U.S. Constitution. *United States v. Causby*, 328 U.S. 256, 265 (1946). The U.S. Supreme Court later applied these principles to Pennsylvania-based property in *Griggs v. Allegheny County*, 369 U.S. 84 (1962), concluding that, by invading the superadjacent airspace above a landowner's private property, Allegheny County had accomplished a *de facto* taking of an "overflight easement" across the property.

It follows that, if "public natural resources" were construed to include the air (or anything else) in the superadjacent airspace above a landowner's private property, the Commonwealth's attendant holding of those resources in public trust would be no different than a governmental "invasion of the surface." *See Causby*, 328 U.S. at 265. The Commonwealth, in other words, would interfere with the landowner's use of the airspace by having occupied it with a "trust asset," potentially effectuating an uncompensated taking of private property, in violation of the Fifth Amendment. *Id*. An interpretation of that type should be avoided because, as our Supreme Court has emphasized, a state constitution cannot be interpreted to provide lesser protections than the federal Constitution. *See*, *e.g.*, *Commonwealth v. Matos*, 672 A.2d 769, 774 n.7 (Pa. 1996).

The same reasoning applies to the groundwater that exists beneath a landowner's private property and the riparian rights in the surface waters that are adjacent to it. The landowner holds an ownership interest in the groundwater and riparian rights, while the government does not. *See, e.g.*, *Wheatley v. Baugh*, 25 Pa. 528 (Pa. 1855) (percolating waters are part of the land in which they are found; only owner of the land has an ownership interest in them); *Catale v. Rich*, 19 Pa.D.&C.3d 371, 374 (Lawrence Co. C.C.P. 1980) (same). Again, if "public natural resources" were construed to embrace those things, the Commonwealth's attendant holding of them in trust would interfere with the landowner's right to make use of them and, therefore, might amount to an uncompensated taking of private property, in violation of the Fifth Amendment. That type of interpretation must be avoided.

Here, the Ordinance governs only the *private use of private property* and, consequently, does not implicate any trustee obligations under Article I, Section 27. The private property that the Ordinance regulates is not part of the "public natural resources," *i.e.*, the "corpus" of the trust. *See PEDF*, 161 A.3d at 931 & n.22 (Commonwealth's trustee obligations do not apply to purely private property rights); *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976) ("property here involved is public property, a 'public Common', and that it is possessed of certain natural, scenic, historic and esthetic values."). Accordingly, the Court should reject the

Riverkeeper's suggestion that the "air" is part of the "trust" such that municipalities have fiduciary duties to protect it.

3. The Township Did Not Breach Alleged Fiduciary Duties Under Article I, Section 27 Because The Township Has No Affirmative Duty To Legislate To Protect The Environment.

Dicta in *PEDF* suggests that the third sentence of Article I, § 27 imposes a duty on the Commonwealth to "act affirmatively via legislation to protect the environment." *Id*. at 933. That *dicta* relies on *Geer v. Connecticut*, 161 U.S. 519 (1896), *overruled by Hughes v. Oklahoma*, 441 U.S. 322 (1979), for one statement in it. In the course of describing the state's ownership of game, the U.S. Supreme Court quoted from an Illinois Supreme Court case that stated:

> "'It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the state; and hence, by implication, *it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state*. But, in any view, the question of individual enjoyment is one of public policy, and not of private right.'"

Geer, 161 U.S. at 534 (quoting *Magner v. People*, 97 Ill. 320 (1881) (emphasis to indicate portion on which the *dicta* relies).

The *dicta's* reliance is misplaced for at least two reasons. First, the statement was not made by the U.S. Supreme Court as a comment on the nature of the public trust; the Court was quoting a much larger section from an Illinois Supreme Court case to support its point that state courts had also concluded that the states have

authority "to qualify and restrict the ownership in game killed within its limits." *Id*. at 532-33. Second, the U.S. Supreme Court held only that the nature of property in game gives the state the *authority* (*i.e.*, the police power) to regulate the taking of game and to prohibit its shipment out of state; it did not make any holding regarding affirmative duties of the states with respect to game or the public trust. *See, e.g.*, *Id*. at 534.

There is nothing in Pennsylvania's common-law public trust doctrine, embodied in Article I, § 27, suggesting that the doctrine imposes "fiduciary obligations" analogous to a legal "trust" to which trust law would apply, such as advocated by the Riverkeeper and *PEDF*'s *dicta*. Rather, the public trust doctrine uses the word "trust" as an imperfect metaphor to capture the idea that the state is *restrained* from substantially impairing the common-law public right to use public-trust resources for certain purposes. The public trust doctrine is rooted in the idea that the state is restrained from disposing or allowing uses of public trust resources that substantially impair the recognized public use of those resources. There is no source under the Pennsylvania conception of the public trust doctrine, and *PEDF*'s *dicta* cites to none, for imposing fiduciary duties on the state to affirmatively act to protect public-trust resources.

Regardless, the separation of powers issues presented by a conclusion that the Commonwealth must "act affirmatively *via legislation* to protect the environment"

are manifest. Courts may not use Article I, § 27 as vehicle to *legislate* environmental policy in Pennsylvania, and to impose that policy on the legislative branch (or the executive branch). That novel theory seeks to impose fiduciary duties on the legislative branch of government as if the Riverkeeper, and litigants like it, were the beneficiaries of a traditional "legal" trust, when the public trust doctrine has not previously been applied in that way.

Indeed, it is difficult to imagine a judicial act more coercive upon the legislative branch than to supplant existing statutes with the court's own formulation of policy, and preclude future legislative discretion on the same issue. By claiming that the Ordinance violates Article I, § 27, the Riverkeeper is, effectively, asking the Court to do away with the legislative process entirely on the issue of "public natural resources" on the theory that the legislative branch *is not doing enough*. If "not doing enough" were the standard for judicial action, individual judges would regularly be asked to substitute their individual judgment for the collective judgment of the legislative branch, which should strike this Court as a singularly bad and undemocratic idea.

Likewise, under separation of powers jurisprudence, the political question doctrine prevents judicial review of certain legislative and executive actions, particularly where, as here, there is a lack of judicially discoverable standards to exercise, and where a court's review would require a discretionary policy

determination. *See, e.g., Sweeney v. Tucker*, 375 A.2d 698, 706 (Pa. 1977) (political question doctrine applies to issue if, *inter alia*, there is "lack of judicially manageable standards for resolving" the issue, an "impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion," or "the impossibility of a court's undertaking independent resolution [of the issue] without expressing lack of the respect due coordinate branches of government"). If this Court found, for example, that the General Assembly, as trustee, should be held to some recognized standard of care, it would nonetheless lack the "legal tools" necessary to determine whether the General Assembly satisfied that standard.

Say, for example, the Court concluded that the applicable standard was "reasonable prudence." The assessment of what may or may not be "reasonably prudent" where the "air" or "water" is concerned would inevitably involve numerous and competing *policy* considerations. These would include such questions as which measures should be required, how quickly they should be implemented, who should bear the burdens and costs, and how the risks and uncertainties should be allocated. This Court could not decide the issue without making an initial policy determination of a kind clearly for nonjudicial discretion. *See Glenn Johnston, Inc. v. Commonwealth, Dep't of Revenue*, 726 A.2d 384, 388 (Pa. 1999) (policy determinations are within exclusive purview of legislature; it would be a "gross violation of the separation of powers doctrine" for court to intrude into that arena);

Commonwealth v. Hicks, 466 A.2d 613, 615 n.4 (Pa. 1983) (improper for a court to substitute its policy judgment for that of the Legislature); *Mayhugh v. Coon*, 331 A.2d 452, 456 (Pa. 1975) (court's function is to interpret legislative enactments, not to promulgate them.); *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.*, 199 A.2d 266, 267 (Pa. 1964) (responsibility to enunciate public policy rests with legislature alone).

Along similar lines, even if this Court *could* somehow discern, *without* violating separation of powers principles, that the General Assembly was "not doing enough" to regulate air or water, it lacks the authority to mandate the enactment of legislation in this arena.[2] As this Court explained, in rejecting a request for it to order certain members of the General Assembly "to pass appropriate legislation to provide compensation for plaintiff's claim [of false imprisonment] and to establish a board to hear moral claims against the Commonwealth," there would be a "complete ***negation***" of separation of powers principles if it mandated the enactment of legislation. *Jones v. Packel*, 342 A.2d 434, 438 (Pa. Cmwlth. 1975) (emphasis added); *see also Pennsylvania State Ass'n of County Commissioners v. Commonwealth*, 681 A.2d 699, 702 (Pa. 1996) (litigants may not sue in court to compel legislature to enact law); *Erie Firefighters Local No. 293 of Int'l Ass'n of*

[2] The township, in adopting the Ordinance, was acting in its legislative capacity, as delegated by the General Assembly.

Firefighters v. Gardner, 178 A.2d 691, 695-96 (Pa. 1962) (courts cannot compel defendants to enact legislation, as legislative function is purely discretionary and such action would be unwarranted usurpation of power reposed in legislative branch).

4. The Ordinance Does Not "Infringe[] On Individual Environmental Rights" Because A Zoning Ordinance Cannot Deprive Rights Secured By Article I, Section 27.

Finally, the Riverkeeper argues at length that the Ordinance violates rights under Article I, § 27. The Ordinance does not deprive the Riverkeeper of clean air, pure water, or the enjoyment of the natural, scenic, historic, or esthetic values of the environment. The Ordinance does not contaminate water, pollute the air, damage historic features, or otherwise have any impact on the environment. Rather, it simply establishes where, and under what conditions, *private landowners* may make otherwise lawful use of their *private property*.

As our Supreme Court expressly recognized in *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Co.*, 515 A.2d 1331 (Pa. 1986), the provisions of Article I of the Pennsylvania Constitution protect the citizens of the Commonwealth from the State and ***not*** from each other. Moreover, the common-law maxim – *sic utere tuo ut alienum non laedas* (so use your own property as not to injure your neighbors) – is not a source of a mandatory constitutional duty on the part of the Commonwealth or its municipalities to exercise

the police power in order to protect citizens from each other by, for example, restricting Citizen A's use of his property in order to protect Citizen B from a potential nuisance. *See Robinson Township v. Commonwealth*, 83 A.3d 901, 1013 n.2 (Pa. 2013) (Saylor, J., dissenting).

If a person uses his or her property in a way that unlawfully invades his neighbor's property, he may be liable to his neighbor under the common law. But there is no "state action" and, as a consequence, Article I is not implicated.[3] *See also Staino v. Commonwealth, Pennsylvania State Horse Racing Com.*, 512 A.2d 75, 77 (Pa. Cmwlth. 1983) (fact that corporation is licensed and pervasively regulated by state does not make its actions state action); *White Fence Farm, Inc.*, 99 Ill.App.3d at 243-44 (although plaintiff had right under state's constitution to "healthful environment," it did not enjoy right to be free from issuance of landfill permit, which did not itself deprive plaintiff of anything).

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[3] A possible, narrow exception to this general rule comes into play if a legislative enactment, on its face, authorizes a person to use his private property in a way that deprives his neighbor of a property interest and shields him from liability for doing so. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (where New York statute forced landlord to allow cable television company to install facilities on his private property, company's installation of the facilities amounted to state action for purposes of Fifth Amendment). That very rare scenario is not present here, as the Ordinance does not expressly authorize anyone to use private property in a way that deprives his neighbor of a property interest or shield anyone from liability for doing so.

It is important to note, in this regard, that Article I, § 27 cannot be interpreted to create or reallocate private property rights. It cannot be construed to take a landowner's private property rights and give them to his neighbor, in the name of securing the neighbor's right to clean air, pure water, or the enjoyment of the natural, scenic, historic, or esthetic values of the environment. It cannot, in other words, be read to take away the landowner's right to make an otherwise lawful (*i.e.*, non-trespassory and non-nuisance-creating) use of his private property and transfer it to his neighbor so that the neighbor can realize some type of individual, environmentally-focused benefit.

Again, if Article I, § 27 were interpreted that way, it would raise serious concerns that it had effectuated an uncompensated taking of private property, in violation of the Fifth Amendment to the U.S. Constitution. *See*, *e.g.*, Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2274 (1970) ("Broughton Analysis," cited in *PEDF*) ("Certainly the amendment was not intended to apply to purely private rights–among other things, it would have been in violation of the 5th and 14th Amendments to the United States Constitution as a taking of property without just compensation, if so interpreted.").

An interpretation of that type should be avoided because, although a state constitution may offer more protections for private property owners than the federal Constitution, it cannot provide fewer protections: "The federal Constitution provides

a *minimum* of rights below which the states cannot go." *Matos*, 672 A.2d at 774 n.7 (emphasis in original). *See also In re King Properties*, 635 A.2d 128, 131 n.6 (Pa. 1993) (same), *overruled on other grounds in Commonwealth v. Real Property and Improvements Commonly Known as 5444 Spruce Street*, 832 A.2d 396 (Pa. 2003).

It is therefore apparent that, contrary to what the Riverkeeper contends, the Ordinance does not deprive them of any rights under Article I, § 27. It simply authorizes a private party to engage in activity on private property that, in the future, may or may not harm the Riverkeeper. As a matter of law, speculative – or even actual – harm that the Riverkeeper may experience as a result of the actions that a private party takes under the Ordinance does not trigger the protections of Article I of the Pennsylvania Constitution.

Consistent with Chief Justice Saylor's observations in *Robinson Township*, the analysis (which the Riverkeeper overlooks) *must* begin with the recognition of the inherent and constitutionally-protected right of private property owners to use their property for any lawful purpose. *See Cleaver v. Board of Adjustment of Tredyffrin Township*, 200 A.2d 408, 411 (Pa. 1964). *See also Driscoll v. Corbett*, 69 A.3d 197, 208-209 (Pa. 2013) ("The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part

of the citizen's natural liberty — an expression of his freedom — guaranteed as inviolate by every American Bill of Rights").

Zoning, in turn, is an exercise of the police power that *restricts* that inherent and constitutionally-protected right and "can be sustained only if it is clearly necessary to protect the health or safety or morals or general welfare of the people." *See Hopewell Township Board of Supervisors v. Golla*, 452 A.2d 1337, 1342 (Pa. 1982). It necessarily follows that zoning, or the exercise of police power to *limit* an otherwise constitutionally-protected right, might be unconstitutional if it goes too far by overly restricting the right, but it is not, and cannot be, unconstitutional by not going far enough.

In short, unless and until it is prohibited by a valid exercise of the police power, a private landowner has an unquestioned right to make otherwise lawful use of his private property. Citizen A, therefore, has no *constitutional* claim if a municipal zoning ordinance allows Citizen B to use his private property in a manner that is undesirable to him. Citizen A may dislike Citizen B's particular use of his property and may have standing to complain about, or challenge, that use under the Pennsylvania Municipalities Planning Code or another state law. Citizen A may also have a claim in nuisance or trespass, depending on the facts. But Citizen A does not have a claim that he has been deprived of Article I constitutional rights because a

zoning ordinance *either authorizes or fails to restrict* Citizen B's otherwise lawful use of his private property.

The argument, therefore, that a local zoning ordinance, or a decision that a local official makes under it, can be declared *unconstitutional* because it *permits* a private property owner to do something that he has an inherent right to do anyway is fundamentally flawed. To conclude otherwise is to contend that the Commonwealth and its political subdivisions have a constitutional obligation to exercise their police power to zone and adopt ever-more restrictive property-use regulations. That flawed argument is precisely the one that the Riverkeeper is making in this case. This Court should reject it.

IV. CONCLUSION

The Court should reject the Riverkeeper's arguments and uphold the Ordinance because it does not violate Article I §§ 1 or 27 of the Pennsylvania Constitution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Pa.R.A.P. 531, I hereby certify that this *amicus curiae* brief contains less than 7,000 words as calculated by the word count feature on the word processing program that was used to prepare it.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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