

“Life for two weeks on the mountaintops would show up many things about life during the other fifty weeks down below.” – Benton MacKaye¹

CONSTITUTIONAL PROTECTION OF THE APPALACHIAN TRAIL: CAN WE RELY ON LOCAL GOVERNMENTS?

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I. Introduction

The Appalachian Trail (“Trail”) spans approximately 2,175 miles from Mount Katahdin, Maine, to Springer Mountain, Georgia.² Recent estimates indicate three to four million visitors hike a portion of the Trail each year.³ A product of massive expenditures of time and money by federal and state authorities,⁴ the Trail remains a uniquely rugged and remote corridor of land amid the highly urbanized East Coast. Central to the Trail’s legislative management plan is the protection and preservation of its esthetic values, such as its “soundscape”⁵ and “viewshed.”⁶ Yet a recent

¹ Benton MacKaye, *An Appalachian Trail: A Project in Regional Planning*, 9 J. Am. Inst. Architects 325 (1921), available at <http://www.appalachiantrail.org/att/cf/{D25B4747-42A3-4302-8D48-EF35C0B0D9F1}/MacKaye.pdf> (Most historians acknowledge Benton MacKaye as the visionary behind this amazing feat of regional land-use planning due in large part to his influential 1921 article). See History of the Appalachian Trail, <http://www.appalachiantrail.org/site/c.jkLXJ8MQKtH/b.786749/k.D5F9/History.htm> (last visited Oct. 18, 2005) (MacKaye’s initial 1921 “project in regional planning” was a proposal for a network of work camps and communities in the mountains, all linked by a trail that ran from the highest point in New England to the highest point in the South; he called it the Appalachian Trail).

² See About Appalachian Trail Conservancy, http://www.appalachiantrail.org/site/c.jkLXJ8MQKtH/b.715457/k.DEFE/About_ATC.htm (last visited Oct. 18, 2005) (the Appalachian Trail Conservancy is a volunteer-based, private nonprofit organization dedicated to the conservation of the 2,175-mile Appalachian National Scenic Trail, a 250,000-acre greenway extending from Maine to Georgia).

³ See 2,000-Milers: Facts and Statistics, http://www.appalachiantrail.org/site/c.jkLXJ8MQKtH/b.851143/k.C36D/2000Milers_Facts_and_Statistics.htm (last visited Oct. 18, 2005) (noting that the number of people hiking the entire Trail has risen dramatically over the years).

⁴ See History of the Appalachian Trail, <http://www.appalachiantrail.org/site/c.jkLXJ8MQKtH/b.786749/k.D5F9/History.htm> (last visited Oct. 18, 2005) (The Trail’s history can be divided into three eras: idea formulation and Trail construction (circa 1921 to 1937); the era of Trail protection lasting until 1968; and, the era of management and promotion, which continues to this day.); National Trails System Act, 16 U.S.C. §§ 1241-51 (1994) (Congress passed this legislation in 1968, wherein the Trail was designated as a national scenic trail under federal protection. In 1978, Congress amended the National Trails System Act with the Appalachian Trail Bill, which focused on the need to protect the Trail through land acquisition. Congress has authorized over \$90 million since 1978 for land purchases.); Pennsylvania Appalachian Trail Act, 1978 Pa. Laws 87 (codified as amended at 64 PA. STAT. ANN. §§ 801-805 (West 1997)) (Pennsylvania went to great lengths to protect the Trail by enacting the Pennsylvania Appalachian Trail Act and authorizing the land acquisition of 125 acres per mile of trail along a corridor within which the footpath passes.); see also Brief for Appellants at 12-14, *Blue Mountain Pres. Ass’n v. Twp. of Eldred*, 867 A.2d 692 (Pa. Commw. Ct. 2005) (No. 493 CD 2004) (arguing about the validity of land use provisions in respect to the Appalachian Trail).

⁵ See *Blue Mountain Pres. Ass’n*, 867 A.2d at 701 (Preservation group argued that the Township was required by the Pennsylvania Constitution to preserve the soundscape of the Trail through zoning and other provisions).

Pennsylvania Commonwealth Court decision⁷ revealed a weakness in the Trail's protective legislation. The Commonwealth Court's decision not only represents the continuing decline of Pennsylvania's Article I, Section 27 ("Section 27") constitutional jurisprudence,⁸ but it also highlights judicial reluctance to impose land-use restrictions on private property at the expense of the long-protected esthetic characteristics of the Trail purportedly protected by Section 27.⁹

Absent legislative action, the judiciary's "hands-off" approach to critical land-use decisions will lead to disparate levels of protection of the Trail by independent, politicized local governments. Moreover, in light of the development pressure facing the East Coast, local governments are unlikely to impose significant land-use controls. Both of these trends will contribute to the Trail's deterioration and the loss of the Trail's unique esthetic characteristics. As Pennsylvania begins to tap its potential for nature tourism and outdoor recreation,¹⁰ the state must act with similar conviction to protect its "natural, scenic, historic and esthetic values."¹¹

Section II will introduce Section 27 in the context of *Blue Mountain Preservation Ass'n v. Township of Eldred*, 867 A.2d 692 (Pa. Commw. Ct. 2005). Section III will discuss the current status of Section 27 jurisprudence through recent cases decided under its provision. Next, Section IV will focus on the Commonwealth Court's analysis in *Blue Mountain*. Section V will then consider the

⁶ Robert A. Rubin, *Where Now? Survey of Board Members Highlights Protection, Education as Priorities for Next Decade*, APPALACHIAN TRAILWAY NEWS, July 2000, at 39, available at <http://www.appalachiantrail.org/atf/cf/{D25B4747-42A3-4302-8D48-EF35C0B0D9F1}/TrailYears.pdf> (the greenway concept is at the heart of the attempt to protect the "viewshed" along the Trail).

⁷ See *Blue Mountain Pres. Ass'n*, 867 A.2d at 692 (Preservation groups sought judicial review of decision of township board of supervisors approving preliminary plan for development of road course for high performance vehicles adjacent to Appalachian Trail).

⁸ See discussion *infra* Section III.

⁹ The Pennsylvania legislature recognized that the Trail was a source of the "natural, scenic, historic and esthetic values of the environment" to be preserved under Article I, Section 27 of the Pennsylvania Constitution. 64 PA. STAT. ANN. § 804 (West 1997); PA. CONST. art. I, § 27. By designating the Trail a national scenic trail, as opposed to a national recreation trail or a national historic trail, Congress also recognized the Trail as possessing "nationally significant scenic, historic, natural, or cultural qualities . . ." 16 U.S.C. § 1242(a)(2) (1994).

¹⁰ See *infra* Section V for discussion of current environmental legislation and policies in Pennsylvania.

¹¹ PA. CONST. art. I, § 27 ("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.").

legislative intent behind Section 27 and the Pennsylvania Appalachian Trail Act (“Trail Act”)¹² as the foundation for advocating the need for state curtailment of the land-use powers possessed by municipalities in the Trail’s vicinity. Section VI will suggest that the legislature misplaced its reliance on local governments to effectuate the land-use policies embodied in Section 27. After proposing that land-use decisions impacting the Trail environment should be redirected to and reviewed by a state agency, Section VII will propose ways the legislature could define authoritatively the Trail’s “natural, scenic, historic and esthetic values”¹³ protected by Section 27. Finally, Section VIII will attempt to reconcile the tension between the traditional views of property rights and the protection of esthetic environmental values through implementation of a state agency review process designed to preserve the Trail’s primitive quality¹⁴ while respecting private property rights.

II. *Blue Mountain* Facts and Procedural History

In *Blue Mountain Preservation Ass'n v. Township of Eldred*, a controversy arose following the Eldred Township Board of Supervisors’ (“Board”) conditional approval of a preliminary development plan pertaining to a 350-acre property (“Subject Property”) located adjacent to the Trail in Pennsylvania.¹⁵ The Subject Property is located in a rural residential area of Eldred Township, which notably had not enacted a zoning ordinance.¹⁶ Alpine Rose Resorts, Inc. (“Developer”) proposed the construction of a road course for high performance cars and ancillary structures including a country club, fueling stations, and service stations.¹⁷ The Board conditioned its approval of the Developer’s

¹² 64 PA. STAT. ANN. §§ 801-805 (West 1997) (The Commonwealth of Pennsylvania, through the Pennsylvania Department of Environmental Protection (“DEP”) (formerly the Department of Environmental Resources), is authorized independent of any action by a municipality to enter into written cooperative agreements with political subdivisions, landowners, private organizations and individuals and to acquire by agreement, gift, eminent domain or purchase, land, rights-of-way and easements for the purpose of establishing, protecting and maintaining a walking trail right-of-way across this Commonwealth, now generally known as the Appalachian Trail.)

¹³ PA. CONST. art. I, § 27.

¹⁴ See *infra* Section V for discussion of the goals behind Trail protection.

¹⁵ See *Blue Mountain Pres. Ass'n*, 867 A.2d 692, 694-695 (Preservation groups sought judicial review of decision by township board of supervisors approving preliminary plan for development of road course for high performance vehicles adjacent to Appalachian Trail.)

¹⁶ Brief for the Appellants at 11-15, *Blue Mountain Pres. Ass'n*, 867 A.2d 692 (No. 493 CD 2004) (arguing about the validity of land use provisions in respect to the Appalachian Trail).

¹⁷ *Blue Mountain Pres. Ass'n*, 867 A.2d at 694.

plan by, *inter alia*, requiring the monitoring of noise levels to ensure an increase of no more than 5 decibels (DBA) above those specified in a noise study representing existing ambient sound levels.¹⁸

The plaintiff non-profit preservation associations, Blue Mountain Preservation Association and the Appalachian Trail Conference (collectively, “Associations”), appealed the Board’s decision to the Court of Common Pleas of Monroe County, which resulted in a sharp factual dispute as to the net level of noise the proposed facility would generate. At the onset of the appeal, the Developer conceded to flaws in its original noise study.¹⁹ The Developer then submitted a new noise study through the deposition of an expert witness.²⁰ Associations countered with their own expert witness who testified that the Developer’s second study also contained flaws.²¹ Associations also contended that the Developer’s own noise study indicated that the Board’s sound condition could not be met.²² Nevertheless, the Court of Common Pleas found the opinion of the Developer’s expert credible and accepted their promise “that [the Developer] could honor the 5 decibel sound limit on off-site sound locations.”²³

The Court of Common Pleas initially remanded the case for further consideration of several topics, including the impact of the proposed development on area traffic, but later affirmed the Board’s decision to approve the preliminary land development plan following further Board hearings.²⁴ Associations challenged the Court of Common Pleas’ decision on several grounds. Associations

¹⁸ *Id.* at 695; *see also* Brief for the Appellants at 6, *Blue Mountain Pres. Ass’n*, 867 A.2d 692 (No. 493 CD 2004) (notably, developer selected the 5 DBA requirement).

¹⁹ *Blue Mountain Pres. Ass’n*, 867 A.2d at 695.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 678 (Associations argued the second noise study demonstrated that noise levels would exceed the condition at four off-site locations.).

²³ *Id.* at 697; *see also* Brief for the Appellants at 31, *Blue Mountain Pres. Ass’n*, 867 A.2d 692 (No. 493 CD 2004)

(According to Associations, the Court of Common Pleas abused its discretion by accepting the expert’s assurances in light of the fact that the Developer’s noise study unsubstantiated his promise. Associations argued that by allowing development projects to progress in such a manner “would render the review process meaningless.”).

²⁴ *See Blue Mountain Pres. Ass’n*, 867 A.2d at 695-96 (The hearings were intended to address the impact of increased traffic resulting from the proposed project on neighboring properties and the Trail as well as the impact the project would have on public resources such as utilities, police and fire.).

contended Section 1005-A of the Municipalities Planning Code (“MPC”)²⁵ required the Court of Common Pleas to make specific factual findings pertaining to the following: the credibility of expert witnesses, the resolution of any conflicts in evidence relating to the potential noise impacts from the proposed development and the validity of the Developer’s noise studies.²⁶ Associations advanced several additional claims,²⁷ but argued principally that the Board and Court of Common Pleas failed to carry out their responsibilities under the Trail Act²⁸ and Section 27.²⁹ Specifically, Associations contended the Trail Act and Section 27 imposed an affirmative duty on Eldred Township to protect the Trail and its “soundscape either through zoning or including specific provisions for that purpose in its SALDO.”³⁰

III. Prior Law

A. Constitutional Protection and Case Law

Pennsylvania, along with many other states, revised its constitution to establish a policy of environmental protection in 1971.³¹ Pennsylvania is one of the few states that guarantees certain

²⁵ Municipalities Planning Code, 1968 Pa. Laws 805 (codified as amended at 53 PA. STAT. ANN. §§ 10101-11202 (West 1997)) (demonstrating that the Pennsylvania legislature’s enactment of the MPC granted planning, zoning and other land use powers to municipalities.); *see also* Joel P. Dennison, *New Tricks for an Old Dog: The Changing Role of the Comprehensive Plan Under Pennsylvania’s “Growing Smarter” Land Use Reforms*, 105 DICK. L. REV. 385 (2001) (discussing Pennsylvania’s MPC).

²⁶ *Blue Mountain Pres. Ass’n*, 867 A.2d at 696.

²⁷ Associations believed the Court of Common Pleas erred by affirming the Board’s approval of the preliminary development plan because the Board had not reviewed certain plan modifications, including noise mitigation measures. *Blue Mountain Pres. Ass’n*, 867 A.2d at 697. Moreover, Associations asserted the preliminary development plan did not meet the requirements of Eldred Township’s SALDO and that the SALDO violated the Trail Act and Section 27. *Id.* at 699-700, 705; *see SALDO infra* note 30. Finally, Associations also argued the “proposed development constitute[d] a nuisance *per se*.” *Id.* at 704.

²⁸ 64 PA. STAT. ANN. §§ 801-805 (West 1997).

²⁹ PA. CONST. art. I, § 27.

³⁰ *See Blue Mountain Pres. Ass’n*, 867 A.2d at 701. “SALDO” denotes Eldred Township’s Subdivision and Land Development Ordinance. (citation not available).

³¹ *See* Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173, 181 n.58 (1993) (listing the following state constitutional environmental amendments: ALA. CONST. art. VIII, §§ 1-7; CAL. CONST. art. X, § 2, art. X(A), §§ 1-3 & art. XIV, § 3; COLO. CONST. art. XVIII, § 6; FLA. CONST. art. II, § 7; HAW. CONST. art. IX, § 8 & art. XI, §§ 1, 9; ILL. CONST. art. XI, §§ 1-2; LA. CONST. art. IX, § 1; MASS. CONST. art. XCVII; MICH. CONST. art. IV, § 54; MONT. CONST. art. IX, § 1; N.C. CONST. art. XIV, § 5; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV, §§ 4, 5; OHIO. CONST. art. II, § 36; OR. CONST. art. XIH, § 6; PA. CONST. art. I, § 27; RI. CONST. art. I, § 17; TENN. CONST. art. XI, § 13; TEX. CONST. art. XVI, § 59; UTAH. CONST. art. XVIII, § 1; VA. CONST. art. XI, §§ 1-2).

environmental rights and the preservation of certain environmental values.³² Article I, Section 27 of the Pennsylvania Constitution, commonly called the Environmental Rights Amendment, provides:

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.³³

The first sentence of the amendment affirmatively grants the citizens of Pennsylvania rights to two environmental quality standards, relating to air and water, and to the preservation of four intrinsically important, albeit subjective, environmental values: “natural, scenic, historic and esthetic.”³⁴ As the Supreme Court noted soon after the ratification of Section 27, the recognition of these four environmental values represented a bold new stance of environmental protection with the potential to upset traditional notions of private property rights.³⁵ The amendment also explicitly subjects public natural resources to the public trust doctrine³⁶ for the benefit of current and future generations.³⁷

The first major Pennsylvania Supreme Court case addressing Section 27, *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,³⁸ narrowly construed the Environmental Rights Amendment. The Commonwealth of Pennsylvania brought suit to enjoin construction of a 307-foot observation tower at a proposed location on private property near Gettysburg Battlefield.³⁹ The Commonwealth argued the tower would disturb the “historic, scenic, and aesthetic environment of

³² *Id.* at n.60 (listing HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, §§ 1-2; MASS. CONST. art. XCVII; MONT. CONST. art. II, § 3; N.Y. CONST. art. XIV, § 5; PA. CONST. art. I, § 27; RI. CONST. art. I, § 17).

³³ PA. CONST. art. I, § 27.

³⁴ *Id.*

³⁵ See *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 592 (Pa. 1973) (noting “up until now, aesthetic or historical considerations, by themselves, have not been considered sufficient to constitute a basis for the Commonwealth's exercise of its police power”).

³⁶ The public trust doctrine vests a state with the duty to maintain and protect certain resources for the public. See Serena M. Williams, *Sustaining Urban Green Spaces: Can Public Parks Be Protected Under the Public Trust Doctrine?*, 10 S.C. ENVTL. L.J. 23, 31 (2002). Since its Roman law origin, the contemporary public trust doctrine has evolved to encompass not just navigable and tidal waters but also non-water natural resources. *Id.* at 32-33 (citing Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1970)).

³⁷ PA. CONST. art. I, § 27.

³⁸ *Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d at 594.

³⁹ *Id.* at 589.

Gettysburg” in violation of Section 27.⁴⁰ The Pennsylvania Supreme Court in *Gettysburg* faced conflicting expert testimony regarding the tower’s potential visual impact on the historic battlefield in a municipality without a zoning ordinance.⁴¹ Although the Commonwealth Court’s conclusion pertained to the Commonwealth’s failure to establish that the tower would irreparably harm the Gettysburg environment, the Supreme Court granted allocatur to resolve the dispute of whether Section 27 was self-executing.⁴² As it turned out, the Supreme Court only muddied the water on this issue.⁴³ The majority, two justices, held Section 27 was not self-executing while the two concurring justices and the two dissenting justices found that it was self-executing.⁴⁴

The differing views on the issue of impacts to “natural, scenic, historic and esthetic values” demonstrate the inherent subjectivity of these topics. The concurring justices reviewed the factual record and concluded without explanation that the tower would not cause irreparable harm to the values embodied in the Gettysburg environment.⁴⁵ An animated dissent asserted first that Section 27 was self-executing to prevent reducing the provision to “*an ineffectual constitutional platitude.*”⁴⁶ Then, focusing on the factual dispute, the dissent “juxtapos[ed] . . . the eminent expert witnesses offered by the Commonwealth” with those of the Developer and persuasively reasoned that the proposed tower would violate the rights of citizens to the environmental values protected by Section 27.⁴⁷ In addition, according to the dissent, although the majority did not reach the question of fact regarding esthetic impacts, they opined the need for “supplemental legislation . . . to define the values

⁴⁰ *Id.* at 590.

⁴¹ *Id.*

⁴² *Id.* A self-replicating constitutional provision does not require supporting legislation to enter into force. *Id.* at 591.

⁴³ The question of whether Section 27 is self-executing remains unclear. *Compare* *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976) (noting that other courts had found the provision self-executing and finding no need to “explore the difficult terrain of whether the amendment is or is not ‘self-executing’”) *with* *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612, 620 (Pa. 1993) (citing *Gettysburg* for the notion that Section 27 is not self-executing).

⁴⁴ *Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d at 588. However, the concurring justices agreed in judgment by concluding the Commonwealth failed to meet its burden of proof with regard to the environmental harm at issue. *Id.* at 596.

⁴⁵ *Id.* at 596.

⁴⁶ *Id.* at 597.

⁴⁷ *Id.* at 597-599.

which the amendment seeks to protect and to establish procedures by which the use of private property can be fairly regulated to protect those values.”⁴⁸

The *Gettysburg* decision foreshadowed a trend of heightened judicial scrutiny in approaching Section 27 cases, particularly those with potential impacts to “natural, scenic, historic and esthetic values of the environment” on private property.⁴⁹ The Supreme Court next addressed Section 27 in *Payne v. Kassab*, in which the Court interpreted the Environmental Rights Amendment as partially self-executing.⁵⁰ The appellants in *Payne*, residents and students of the City of Wilkes-Barre, brought suit to enjoin a Pennsylvania Department of Transportation (“Penn DOT”) street-widening project that involved the loss of public park land and the removal of several trees.⁵¹ Appellants argued, *inter alia*, that the Commonwealth violated its duty as trustee under Section 27.⁵² The Supreme Court recognized that the public property underlying the cause of action fell within the scope of the public trust created in Section 27.⁵³ Moreover, the Supreme Court concluded that, at minimum, the public trust portion of Section 27 needed no implementing legislation.⁵⁴ However, in finding that the Commonwealth did not breach its duty as a trustee of Section 27’s values, the Supreme Court recognized that Section 27 implicitly requires a balancing of environmental and social interests.⁵⁵ According to the Court, Penn DOT achieved this balance through compliance with the “elaborate safeguards” of the applicable state

⁴⁸ *Id.* at 595.

⁴⁹ PA. CONST. art. I, § 27.

⁵⁰ 361 A.2d 263, 272 (Pa. 1976).

⁵¹ *Id.* at 264, 267.

⁵² *Id.* at 272.

⁵³ *Id.*

⁵⁴ *Id.* The Supreme Court did not extend this holding to situations where “the Commonwealth as trustee is seeking to curtail or prevent the otherwise entirely legal use of *private* property on the ground that the proposed use impinges, in the words of the amendment’s first sentence, on ‘natural, scenic, historic and esthetic values of the environment.’” *Id.* (emphasis added).

⁵⁵ *Payne*, 361 A.2d at 273.

transportation statute.⁵⁶ The Supreme Court's call for balancing has resulted in lower courts applying the Commonwealth Court's three-part test⁵⁷ in later Section 27 claims.⁵⁸

More recently, however, the Pennsylvania Supreme Court invoked Section 27 as being representative of "a state policy encouraging the preservation of historic and aesthetic resources."⁵⁹ As *United Artists' Theater Circuit* suggests, disputes pertaining to the four environmental values listed in Section 27 often arise in the context of changes to land-use, thus implicating local governmental agencies. The deference accorded local agencies by courts suggests that effectuating the policy of preserving esthetic values depends on agencies that are capable and willing to take action.⁶⁰

B. Effect of Narrow Construction of Section 27

One significant consequence of the application of the Commonwealth Court's three-part test for determining compliance with Section 27 is that the plaintiff faces a heavy burden of proof. The first part of the test only requires the defendant to show compliance with applicable statutes and regulations, but the plaintiff must prove that the environmental harm resulting from the contested action clearly outweighs the benefits to be derived from the action.⁶¹ Not surprisingly, the few cases involving claims of potential adverse impacts to the four environmental values listed in Section 27 had

⁵⁶ *Id.* The statute prohibited highway construction through public parks unless no feasible alternative existed; in those cases, use of public park land should be accomplished in ways to minimize environmental impacts. *Id.* The Supreme Court noted the proposed project would convert less than three percent of the public park land. *Id.* at 269 n. 11.

⁵⁷ See *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976) (articulating the three-part test). See *infra* note 80 and accompanying text.

⁵⁸ It should be noted that the Pennsylvania Supreme Court did not apply the Commonwealth Court's three-part test but rather noted its application by the court below in a footnote. *Payne*, 361 A.2d at 273 n.23; see also discussion *infra* Section B (discussing further effects of *Payne*).

⁵⁹ *United Artists' Theater Circuit, Inc.*, 635 A.2d at 620. In *United Artists' Theater Circuit*, the Pennsylvania Supreme Court used Section 27 to support the City of Philadelphia when it used its police power to pass an ordinance designating a privately owned building as historic, without the consent of the owner. *Id.* The Supreme Court held that an unconstitutional taking of property without just compensation had not occurred. *Id.*

⁶⁰ See Margaret J. Fried & Monique J. Van Damme, *Environmental Protection in a Constitutional Setting*, 68 TEMPLE L. REV. 1369, 1395-1396 (1995) (suggesting courts must develop standards based on the common law and the constitution rather than deferring to agency expertise).

⁶¹ *Payne*, 312 A.2d at 94. See also Robert A. McLaren, *Environmental Protection Based on State Constitutional Law: A Call For Reinterpretation*, 12 U. HAW. L. REV. 123, 139 (1990) (discussing the plaintiff's burden with regards to the *Payne* test).

met with limited success.⁶² Commentators have further noted that the *Payne* “all-purpose test” may actually have the perverse result of obscuring the plain language of Section 27.⁶³

C. Jurisdictional Issues

Another important issue underlying the *Payne* test is determining which authority has jurisdiction over a particular environmental decision. Pennsylvania state laws dealing with air and water standards, site contamination, and solid waste management typically implicate state regulatory agencies such as the Pennsylvania Department of Environmental Protection (“DEP”).⁶⁴ On the other hand, land-use decisions in Pennsylvania typically fall within the jurisdiction of municipalities.⁶⁵

Compliance with applicable state environmental regulations often, by itself, satisfies the *Payne* test, especially when a court views the statutory scheme as a comprehensive declaration of state policy. Thus, in *Concerned Residents of the Yough, Inc. v. Department of Environmental Resources*, the Commonwealth Court held the Department of Environmental Resources (“DER”) did not violate

⁶² See, e.g., *Del-AWARE, Unlimited, Inc. v. Commonwealth, Dep't of Env'tl. Resources*, 508 A.2d 348, 355 (Pa. Commw. Ct. 1986) (supporting DER's conclusion that proposed pumping station was compatible with surrounding area because DER based its conclusion on reviews conducted by the Pennsylvania, Historical and Museum Commission, Corps of Engineers and the Nuclear Regulatory Commission); *Pennsylvania Env'tl. Mgt. Services, Inc. v. Dep't of Env'tl. Resources*, 503 A.2d 477, 480 n.9 (Pa. Commw. Ct. 1986) (remanding case because the Environmental Hearing Board abused its discretion at part three of the *Payne* test by not considering the regional need for landfills). *But see* *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612, 620 (Pa. 1993) (authorizing the police power of the City of Philadelphia in passing a historic preservation ordinance).

⁶³ See, e.g., 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, 712-713 (1999) (discussing the *Payne* test). The scope of the test only reaches the public trust part of Section 27, based on its explicit reference to public natural resources, yet lower courts nonetheless apply it in all types of Section 27 cases. Citizens' rights “to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment” necessarily include private resources. PA. CONST. art. I, § 27. See, e.g., *Del-AWARE, Unlimited, Inc.*, 508 A.2d at 355 (recognizing the visual esthetic impact of a proposed pumping station on a park and historic district); *Pennsylvania Env'tl. Mgt. Services, Inc.*, 503 A.2d at 480 n.9 (holding that the visual impact of a landfill on nearby residences and an inn is a proper consideration to make when addressing the scenic and esthetic values of Section 27).

⁶⁴ See, e.g., *Concerned Citizens for Orderly Progress v. Dep't of Env'tl. Res.*, 387 A.2d 989, 993 (Pa. Commw. Ct. 1978) (“While it is the responsibility of local governmental agencies to deal with planning, zoning and other related functions, it is incumbent upon DER to insure that a proposed project is in conformity with local planning and consistent with statewide supervision of water quality management. Thus, the DER, as trustee of the Commonwealth's public natural resources by virtue of Article I, Section 27 of the Constitution of Pennsylvania, must address the direct impact of issuing such a permit.”); *Concerned Residents of the Yough, Inc. v. Dep't of Env'tl. Res.*, 639 A.2d 1265, 1269-1274 (Pa. Commw. Ct. 1994) (discussing the role of the DER relating to water and air quality).

⁶⁵ See, e.g., *Community College of Delaware County v. Fox*, 342 A.2d 468, 481 (Pa. Commw. Ct. 1975) (concluding municipal agencies have the statutory function to make land-use decisions); *Concerned Citizens for Orderly Progress*, 387 A.2d 989, 993 (Pa. Commw. Ct. 1978) (same); *Smartwood v. Dep't of Env'tl. Res.*, 424 A.2d 993, 996 (Pa. Commw. Ct. 1981) (same); *Raum v. Tredyffrin Township Bd. of Supervisors*, 342 A.2d 450, 451-459 (Pa. Commw. 1975) (discussing a Section 27 challenge to a rezoning by a Township).

Section 27 because it complied with the provisions dealing with noise and esthetics in the applicable solid waste management statute.⁶⁶ Appellants, Westmoreland County and some of its residents, challenged DER's approval of a solid waste disposal permit allowing the development of a residual waste impoundment on a company's existing waste storage and treatment facility.⁶⁷ Appellants contended that DER failed to consider the development's impact on "any factors related to noise, aesthetics or quality of life" under part three of the *Payne* test.⁶⁸ The Commonwealth Court concluded that the solid waste management statute "indicate[d] the General Assembly's clear intent to regulate in plenary fashion every aspect of the disposal of solid waste, consequently, the balancing of environmental concerns mandated by [Section] 27 has been achieved through the legislative process."⁶⁹

In *Community College of Delaware County v. Fox*, the Commonwealth Court held the DER could not be held responsible if it breached its duties under Section 27 when it failed to consider the potential loss of open space in issuing a sewer construction permit.⁷⁰ The Commonwealth Court reasoned that preserving open space falls within the statutory authority of "local government agencies, who are responsible for planning, zoning and other such functions."⁷¹ Section 27, therefore, does not expand the powers and jurisdiction of an agency, but rather it should effectively limit both.⁷² While the Commonwealth Court indicated that it may be desirable for the DER to supervise and review land-

⁶⁶ 639 A.2d at 1275-1276.

⁶⁷ *Id.* at 1267.

⁶⁸ *Id.* at 1275.

⁶⁹ *Id.* Legal commentators opine that decisions such as *Concerned Residents of the Yough, Inc.* demonstrate that "legislative enactments do not necessarily need to comply with constitutional requirements for the protection of trust resources." *See, e.g.,* Susan Morath Horner, *Embryo, Not Fossil: Breathing Life into the Public Trust Doctrine in Wildlife*, 35 LAND & WATER L. REV. 23, 31 (2000).

⁷⁰ 342 A.2d at 482.

⁷¹ *Id.* at 478.

⁷² *Id.* at 482.

use planning decisions by local government agencies, “neither Section 27 nor any pertinent legislation authorizes the DER to provide it.”⁷³

IV. Discussion of the *Blue Mountain* Court’s Analysis

On appeal, the Commonwealth Court framed the main issue as whether “the noise generated by cars on the track will impair the esthetic values of the Trail in violation of the . . .” Trail Act and Section 27.⁷⁴ In this matter of first impression, the Commonwealth Court held neither the Trail Act nor Section 27 created an affirmative duty upon the Township to enact legislation protecting the Trail in the absence of a zoning ordinance.⁷⁵

The Commonwealth Court first established that the MPC allows, but does not require, municipalities to enact zoning ordinances.⁷⁶ Next, the Commonwealth Court found that their decision in *Payne v. Kassab*,⁷⁷ in which they held that “Section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept⁷⁸ to the management of public natural resources of Pennsylvania,” controlled the instant case.⁷⁹ In *Payne*, the Commonwealth Court created a three-part test to determine compliance with Section 27:

- (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?⁸⁰

⁷³ *Id.* As an example, the Commonwealth Court pointed to an executive order whereby the Office of Historic Preservation in the Historical and Museum Commission was delegated responsibility for encouraging the preservation of historic and architectural resources. *Id.* at n.15. But, this was not required in the context of land-use planning. *Id.*

⁷⁴ *Blue Mountain Pres. Ass’n*, 867 A.2d at 694.

⁷⁵ *Id.* at 702-703. The Commonwealth Court stated Section 27 did not create a duty to pass legislation “specifically preserving and protecting environmental treasures.” *Id.* at 702. Similarly, the Court noted that the Trail Act neither creates a “duty to zone, nor provides for noise regulation on or near the Trail.” *Id.* at 703.

⁷⁶ See Section 601, 53 PA. STAT. ANN. § 10601 (West 1997) (stating “[t]he governing body of each municipality . . . may enact, amend and repeal zoning ordinances . . .”).

⁷⁷ 312 A.2d 86; see discussion *supra* Section III.

⁷⁸ See *supra* note 36 and accompanying text.

⁷⁹ *Blue Mountain Pres. Ass’n*, 867 A.2d at 703 (citing *Payne*, 312 A.2d at 94).

⁸⁰ *Payne*, 312 A.2d at 94.

The Commonwealth Court construed the first prong of the *Payne* test as requiring a “consideration” of relevant statutes and regulations rather than imposing a duty upon a municipality to take specific legislative action.⁸¹

The Commonwealth Court considered whether the relevant statutes,⁸² most significantly the Trail Act, imposed an affirmative duty to zone or regulate noise on or near the Trail.⁸³ The express “policy and purpose” of the Trail Act is as follows:

In order to *implement Article I, section 27 of the Constitution of Pennsylvania with respect to the Appalachian Trail in Pennsylvania as a source of natural, scenic, historic and esthetic values to be preserved* and as a public natural resource to be conserved and maintained for the benefit of all the people, the General Assembly finds as a matter of legislative policy that planning and zoning by a municipality . . . to implement Article I, section 27 is a valid exercise of the police power under that code.⁸⁴ (emphasis added)

The Commonwealth Court construed the language of the Trail Act to authorize, but not require, municipalities to enact zoning ordinances taking Trail values into account, and to enact partial zoning ordinances protecting only the Trail.⁸⁵ The court concluded that municipalities had an affirmative duty to take action to protect the Trail only if applicable law required any action at all.⁸⁶ Upon concluding that neither the Trail Act nor Eldred Township’s SALDO required any affirmative action by the township to protect the Trail, the Commonwealth Court declined to construe the general language of the Trail Act into a prescriptive duty to enact an ordinance.⁸⁷

Regarding the second prong of *Payne*, the Court found that the Board made reasonable efforts to minimize future noise levels associated with the proposed development plan.⁸⁸ Specifically, the

⁸¹ *Blue Mountain Pres. Ass’n*, 867 A.2d at 703.

⁸² The Commonwealth Court also concluded Eldred Township’s SALDO, the other applicable statute, did not impose an affirmative duty to zone or regulate noise near the Trail. *Id.* Moreover, the court reasoned that a provision of the MPC requiring zoning ordinances be designed to facilitate the “preservation of the natural, scenic and historic values in the environment . . .” was inapplicable because Eldred Township had not passed a zoning ordinance. *Id.* at n.17.

⁸³ *Id.* at 703-704.

⁸⁴ 64 PA. STAT. ANN. § 802 (West 1997).

⁸⁵ *Blue Mountain Pres. Ass’n*, 867 A.2d at 703.

⁸⁶ *Id.*

⁸⁷ *Id.* at 703-704.

⁸⁸ *Id.* at 704.

Board conditioned the Developer approval upon the maintenance of a certain decibel level, rejected the use of a public announcement system, limited communications on-site between people to radios, phones, and similar devices, and required the Developer to place sound barriers throughout its property.⁸⁹ In addition, the Commonwealth Court referenced the Developer’s evidence showing that the project would comply with existing storm water requirements and would not adversely impact surrounding air quality.⁹⁰ Based on the above, the Commonwealth Court concluded the Board and the Developer made reasonable efforts to minimize environmental harm to a level where allowing the project to proceed further would not constitute an abuse of discretion.⁹¹

Neither the Court of Common Pleas nor the Commonwealth Court undertook a thorough analysis under *Payne*’s third prong. Indeed, the Commonwealth Court stated that a review of the record “clearly” indicated the potential environmental harm that would result from the project could not be said to “so clearly outweigh the benefits to be derived”⁹² In contrast, Associations contended that the negative impacts of the noise generated by the proposed development on the Trail’s “natural, scenic, historic and esthetic values”⁹³ exceeded the project’s purported benefits.⁹⁴ However, the Commonwealth Court implicitly rejected Associations’ argument that the proposed development would result in “permanent and irrevocable” damage to the Trail’s environmental values.⁹⁵

The Commonwealth Court’s application of the *Payne* test’s second and third prongs demonstrates the significance of evidence in land-use cases arising under Section 27. Decisions made by a court at the second prong will invariably determine the resolution of the third prong. Here, the Commonwealth Court faced conflicting evidence concerning the development project’s potential

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Blue Mountain Pres. Ass’n*, 867 A.2d at 704.

⁹² *Id.*

⁹³ PA. CONST. art. I, § 27.

⁹⁴ Associations characterized the planned benefits of the development project as “an opportunity to drive fast sports cars at high speeds around a track at an exclusive private country club.” Brief for the Appellants at 61, *Blue Mountain Pres. Ass’n*, 867 A.2d 692 (No. 493 CD 2004). Even more disconcerting are Associations’ assertion that Developer was attempting to take advantage of the absence of a zoning ordinance in Eldred Township. *Id.* at 63.

⁹⁵ *Id.* at 61.

impact “on the esthetic values of the Trail, particularly from a sound standpoint.”⁹⁶ Associations specifically challenged the credibility and validity of the Developer’s noise studies and associated expert testimony.⁹⁷ The Commonwealth Court concluded that the Court of Common Pleas did not err by accepting, and relying on, the Developer’s expert witness testimony, finding him properly qualified and his deposition testimony unequivocal, albeit allegedly flawed.⁹⁸ The Commonwealth Court reasoned that these concerns only affected the weight and credibility given to the expert’s testimony.⁹⁹ In this way, the Court essentially found the second and third prongs satisfied because of the Developer’s expert witness.

As with the Court of Common Pleas, the Commonwealth Court approached the issue of compliance with regard to the sound condition from an enforcement perspective rather than undertaking a serious consideration of whether the proposed land-use would impact the constitutionally-protected values of the Trail.¹⁰⁰ In other words, the court could enforce the Developer’s promise to comply if the Developer did not actually comply with the sound condition.¹⁰¹ The Commonwealth Court found this approach appropriate in light of the absence of any noise restrictions in Eldred Township’s SALDO and the authorization under the MPC to impose conditions upon land development plans.¹⁰² The Commonwealth Court’s reliance on the power of enforcement indicates that neither the Court of Common Pleas nor the Commonwealth Court felt confident that the Developer could meet the 5 DBA limit. Furthermore, the court implicitly answered the question of

⁹⁶ *Blue Mountain Pres. Ass’n*, 867 A.2d at 701.

⁹⁷ *Id.* at 696-697.

⁹⁸ *Id.* at 701.

⁹⁹ *Id.* The Commonwealth Court also found no authority, including Section 1005-A of the MPC, to mandate “specific findings regarding the credibility of every witness.” *Id.* at 697. Therefore, the Commonwealth Court found no abuse of discretion by the Court of Common Pleas in only discussing and relying on the testimony of Developer’s expert witness. *Id.* Associations emphasized the extensive and relevant qualifications of their expert witness, especially his role in the development of the computer model used by Developer’s expert witness to estimate noise impacts. Brief for the Appellants at 17-18, *Blue Mountain Pres. Ass’n*, 867 A.2d 692 (No. 493 CD 2004). Notably, the Associations’ expert witness concluded Developer’s second noise study was “scientifically invalid and unreliable” and that the proposed development would cause substantial adverse noise impacts to the Trail. *Id.* at 18-20.

¹⁰⁰ *Blue Mountain Pres. Ass’n*, 867 A.2d at 699, 701.

¹⁰¹ *Id.*

¹⁰² *Id.* at 698.

environmental harm posed by prong three before actually reaching it by approving the stipulated sound condition under prong two. This analysis suggests that land-use decisions will pass Section 27 constitutional muster if the challenged decision or action satisfies the *Payne* test's first two prongs. Perhaps a more appropriate analysis at prong two would call for weighing the *risk* of a noise problem against the benefits of the project and for evaluating whether the Developer has made reasonable efforts to minimize the *risk* of a noise problem. Treating the prong two analysis as a question of risk gives meaning to the balancing of interests at play in prong three and may lead to different outcomes.

The Commonwealth Court concluded, however, the noise condition was unjustifiably vague because the Developer did not include exact locations to monitor noise measurement in order to determine compliance.¹⁰³ Accordingly, the Commonwealth Court remanded the case with instructions to clarify the noise condition.¹⁰⁴

V. History of the Act and Current Public Sentiment

A review of the legislative intent behind both Section 27 and the Trail Act reveals a concerted effort by the Pennsylvania legislature to change from a policy of gradual degradation of natural resources to a policy aimed at conservatism and preservation. Although the judiciary's Section 27 constitutional jurisprudence suggests a change in public sentiment regarding environmental protection, current legislation suggests Pennsylvanians remain adamant about protecting the environment. One commentator described the enactment of Section 27 as follows:

The public enthusiasm for environmental protection that swept the country in the early 1970s was premised on the view that ecological degradation is an unacceptable price for social and economic progress. To ensure protection, many argued, the environment should be recognized in state constitutions as well as the United States constitution. On May 18, 1971, Pennsylvania citizens overwhelmingly approved such a provision.¹⁰⁵

¹⁰³ *Id.* at 699.

¹⁰⁴ *Id.*

¹⁰⁵ Dernbach, *supra* note 63, at 695.

The dissent in *Gettysburg* aptly noted that Section 27 “received 1,021,342 votes: more than any candidate seeking state-wide office.”¹⁰⁶

In terms of the history of the Trail, Pennsylvania’s Trail Act¹⁰⁷ represents one piece of a comprehensive plan of protection and management. By enacting the National Trails System Act of 1968, Congress designated the Trail as a national scenic trail.¹⁰⁸ The National Trails System Act enabled federal agencies to purchase a 200-foot wide corridor of land through condemnation.¹⁰⁹ Two problems, however, soon became apparent. First, Congress overestimated the ability of states to protect the Trail without federal assistance.¹¹⁰ Second, development pressure threatened the Trail’s unique characteristics in many areas.¹¹¹ In response, Congress amended the National Trails System Act in 1978 to expand the federal government role in Trail protection and to authorize the condemnation of a 1,000-foot wide corridor of land.¹¹²

Management of the Trail is currently accomplished through “a patchwork of statutory law, private agreements, and voluntary cooperation.”¹¹³ Consistent with Congressional preference and authority, the National Park Service (“NPS”) delegated general management and maintenance responsibility of the Trail to the Appalachian Trail Conference (ATC), a not-for-profit organization formed in 1925, while still retaining ultimate control over management decisions.¹¹⁴ Recognizing the unique managerial problems posed by a trail bordering fourteen states, the NPS created a

¹⁰⁶ *Nat’l Gettysburg Battlefield Tower, Inc.*, 311 A.2d at 596.

¹⁰⁷ 64 PA. STAT. ANN. §§ 801-805 (West 1997).

¹⁰⁸ 16 U.S.C. §§ 1241-51 (1994) (Section 1241(a) states trails should be established “to provide for the ever-increasing outdoor recreation needs of an expanding population and in order to promote the preservation of . . . outdoor areas and historic resources of the Nation.”).

¹⁰⁹ 16 U.S.C. § 1246(g) (1994).

¹¹⁰ *See Oversight of the National Trails System Act of 1968: Hearings before the Subcommittee on National Parks and Recreation of the House Committee on Interior and Insular Affairs*, 94th Cong. 18 (1977).

¹¹¹ *Id.*

¹¹² *Id.*; see National Trails Systems Act, Pub. L. No. 95-248, 92 Stat. 159 (1978).

¹¹³ See James J. Vinch, *The Telecommunications Act of 1996 and Viewshed Protection for the National Scenic Trails*, 15 J. LAND USE & ENVTL. LAW 93, 104-108 (1999) (discussing the legislative history of the National Trail Systems Act).

¹¹⁴ 16 U.S.C. §§ 1241, 1246(h)(1) (1994).

Comprehensive Management Plan (“Comprehensive Plan”) for the Trail.¹¹⁵ The Comprehensive Plan continues to provide an overarching management philosophy, which is imperative because of the involvement of the federal government, state and local government agencies, volunteer organizations, and private landowners.¹¹⁶ The Comprehensive Plan’s central goal is to manage the Trail “to favor those values which have been traditional as goals within the [Appalachian Trail] community.”¹¹⁷ The Comprehensive Plan brings special attention to the preservation of esthetic values such as “[o]pen areas and vistas.”¹¹⁸ Understanding that the Trail experience would suffer not only from visual impairments but also from “[n]oise pollution, degradation of air quality, and that intangible, the human community along the Trail,”¹¹⁹ the Comprehensive Plan defines a “trailway”¹²⁰ for further protection.¹²¹ The trailway is a term used to describe the Trail environment, specifically its isolated and scenic character, and includes lands in the vicinity of the Trail corridor.¹²² Because it was not possible to buffer the Trail solely through the federal and state land acquisition program,¹²³ the Comprehensive Plan encourages the use of other protective measures including “[s]upportive zoning, donation of conservation easements, or voluntary restraint on adjacent private lands . . .” to guard

¹¹⁵ See APPALACHIAN TRAIL PROJECT OFFICE, NAT’L PARK SERV., COMPREHENSIVE PLAN FOR THE PROTECTION, DEVELOPMENT AND USE OF THE APPALACHIAN NATIONAL SCENIC TRAIL (1981), available at http://www.appalachiantrail.org/atf/cf/%7BD25B4747-42A3-4302-8D48-EF35C0B0D9F1%7D/CompPlan_web.pdf [hereinafter COMPREHENSIVE PLAN] (The NPS is legally bound to the COMPREHENSIVE PLAN relating to all Trail management decisions); see also Vinch, *supra* note 113, at 108 (discussing the COMPREHENSIVE PLAN).

¹¹⁶ See COMPREHENSIVE PLAN, *supra* note 115, at 1.

¹¹⁷ *Id.* at 5.

¹¹⁸ *Id.* at 6.

¹¹⁹ *Id.* at 25.

¹²⁰ See *id.* at 25 (The COMPREHENSIVE PLAN defines trailway as: [a] general term describing the environment of the Trail, a “zone of concern” in which consideration of the effects of land uses on the Trail experience is important. This zone of concern may include private lands adjacent to the corridor and lands in multiple-use management by government agencies, on which consideration of the Trail is sought on a cooperative basis. *Id.* at 2.).

¹²¹ The property of concern in *Blue Mountain* falls within the trailway due to the project’s potential impact on the Trail experience. Brief for the Appellants at 13, *Blue Mountain Pres. Ass’n*, 867 A.2d 692 (No. 493 CD 2004).

¹²² See COMPREHENSIVE PLAN, *supra* note 115, at 25.

¹²³ *Id.* at 26.

against incompatible land-uses adjacent to the Trail.¹²⁴ Local agencies are charged with making sure “that the purposes of laws and regulations are not neglected within their jurisdictions.”¹²⁵

In enacting the Trail Act in 1978,¹²⁶ the Pennsylvania General Assembly emphasized the importance of supportive zoning in Trail protection. Under Section 804 of the Trail Act, municipalities:

*shall have the power and their duty shall be to take such action consistent with applicable law, as at least an interim measure, to preserve the natural, scenic, historic and esthetic values of the trail and to conserve and maintain it as a public natural resource. Such municipalities may act hereunder in that section of the municipality through which the Appalachian Trail passes without zoning the entire municipality as required under section 605 of the Pennsylvania Municipalities Planning Code.*¹²⁷

Recent actions by the Pennsylvania Governor Edward Rendell indicate the legislature and the public continue to stand behind environmental protection. In July 2005, Governor Rendell signed into law the Growing Greener II initiative, “the single largest environmental investment in state history.”¹²⁸ Among other goals, the legislature designated the \$625 million voter-approved plan to protect natural areas, open spaces, clean up rivers, improve state parks, and enhance outdoor recreation.¹²⁹ The Rendell administration also has shown commitment to a maturing policy of sustainable development in Pennsylvania.¹³⁰ Furthermore, in October 2005, Governor Rendell announced an award of \$110,000 in grants to promote nature tourism in twelve northern counties called “Pennsylvania Wilds.”¹³¹ The

¹²⁴ *Id.* at 6, 26.

¹²⁵ *Id.* at 7. In an August 2002 letter, the NPS advised the Eldred Township Planning Commission of the management goals pertaining to the Trail. Brief for the Appellants at 11, *Blue Mountain Pres. Ass'n*, 867 A.2d 692 (No. 493 CD 2004). The COMPREHENSIVE PLAN is legally binding on the NPS with respect to all Trail management decisions. Vinch, *supra* note 113, at 108. These decisions are subject to judicial review. *Id.* At the local level, “incompatible activities will be controlled...by enforcement of laws and Trail regulations.” See COMPREHENSIVE PLAN, *supra* note 115, at 7.

¹²⁶ 64 PA. STAT. ANN. §§ 801-805 (West 1997); see also *Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d at 594-95 (expressing that the policy and purpose of the Trail Act is to implant Section 27).

¹²⁷ § 804 (emphasis added).

¹²⁸ See Press Release, Pennsylvania Office of the Governor, Growing Greener II, <http://www.governor.state.pa.us/governor/cwp/view.asp?a=1114&q=437909> (last visited Nov. 2, 2005) (describing the Growing Greener II initiative).

¹²⁹ *Id.*

¹³⁰ See Nancy P. Spyke, *Heeding the Call: Making Sustainability a Matter of Pennsylvania Law*, 109 PENN ST. L. REV. 729, 743-44 (2005) (discussing Pennsylvania's growing commitment to sustainable development).

¹³¹ See Press Release, Pennsylvania Office of the Governor, New Opportunities to Expand Nature Tourism Abound in PA Wilds (Oct. 19, 2005), <http://www.dcnr.state.pa.us/news/newsreleases/2005/1005-pawildsgrants.htm> (last visited Nov. 2, 2005) (discussing grants).

grants will assist the Pennsylvania Wilds in attracting tourists to destinations such as the Grand Canyon of Pennsylvania in Tioga County and the Allegheny National Forest in McKean and Warren counties.¹³² The award was a byproduct of Governor Rendell’s Task Force on the Pennsylvania Wilds whose “mission is to examine how the region's public lands can better advance local economies, while also protecting its vast natural areas.”¹³³ The Task Force found Pennsylvania and surrounding states to have largely untapped potential for nature tourism and outdoor recreation.¹³⁴ These actions are consistent with those taken by earlier administrations. For example, in 2002, Pennsylvania Governor Mark Schweiker announced “\$3 million in grants for the planning, acquisition, construction and maintenance of more than 295 miles of rail-trails and recreational trails in 22 Pennsylvania counties.”¹³⁵ Through these initiatives and the continued dedication of individuals and communities throughout the state, Pennsylvania has become a national leader in trail development and protection.¹³⁶ Thus, environmental protection remains a strong part of Pennsylvania’s current legislative policy. However, the question remains regarding whether those entities charged with the public trust have been loyal, or are capable of being loyal, to the express policy of the Trail Act.

VI. Legislative Intervention is Necessary to Effectuate the Policy of the Trail Act

The environmental rights clause of Section 27 imposes a substantive limitation on the government’s ability to interfere with the “natural, scenic, historic and esthetic values of the environment.”¹³⁷ This follows from the provision that creates individual rights to the preservation of these values and the mandate that the Commonwealth act as the trustee of these resources.¹³⁸ The

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See Press Release, Pennsylvania Department of Conservation and Natural Resources (“DCNR”), Gov. Schweiker Announces \$3 Million for PA Trails (May 15, 2002), <http://www.dcnr.state.pa.us/news/newsreleases/2002/trailgrants0502.htm> (last visited Nov. 19, 2005) (discussing grants). The Appalachian Trail Conference received \$60,000 to fund trail maintenance and other activities performed by its staff.

Id.

¹³⁶ See New Opportunities to Expand Nature Tourism Abound in PA Wilds, *supra* note 131 (discussing grants); see also Gov. Schweiker Announces \$3 Million for PA Trails, *supra* note 135 (discussing grants).

¹³⁷ Dernbach, *supra* note 63, at 724.

¹³⁸ *Id.*

absence of language about the nature of the state’s duties to protect these rights has frustrated the protection of these environmental values. While state and local agencies share the responsibility of preserving these values, their separate and distinct statutory functions create gaps that potentially allow for governmental actions detrimental to these values.¹³⁹

More importantly, the bulk of the duty to preserve “natural, scenic, historic and esthetic values of the environment”¹⁴⁰ falls on local governmental agencies, as decisions pertaining to land-use generally fall within their purview. While Section 27 puts Pennsylvania courts in a position to uphold land-use restrictions with relative ease,¹⁴¹ actual preservation of these values hinges on the presumption that local governmental agencies will pass protective legislation. Municipalities, however, have a legitimate interest that conflicts with a policy of preserving the four environmental values listed in Section 27. Municipalities need economic activity to increase property values or to generate taxable income.¹⁴² Thus, even with the best intentions, municipalities have an incentive to allow development, especially in the case of high revenue projects. Judicial deference accorded to land-use decisions, therefore, could lead to the approval of projects harmful to the Trail’s esthetic values.¹⁴³ Local officials’ lack of expertise may exacerbate this problem in situations where land-use planning coincides with environmental regulation.¹⁴⁴

Municipalities are not fulfilling their duties as “trustees” of Pennsylvania’s esthetic resources through their land-use powers. In addition, courts are concomitantly unwilling to place that burden on them. By construing the Trail Act as not mandating an affirmative duty upon municipalities to enact

¹³⁹ *Fox*, 342 A.2d at 481.

¹⁴⁰ PA. CONST. art. I, § 27.

¹⁴¹ *Id.*

¹⁴² Anika Singh, *Implementing Planned Development: The Case of New Jersey*, 30 N.Y.U. REV. L. & SOC. CHANGE 151, 157 (2005).

¹⁴³ See James H. Wickersham, Note, *The Quiet Revolution Continues: The New Emerging Model for State Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 535 (1994) (discussing that judges’ lack of expertise leads to deference to local officials).

¹⁴⁴ Michael A. Wolf, *Earning Deference: Reflections on the Merger of Environmental and Land-Use Law*, 20 PACE ENVTL. L. REV. 253, 259 (2002).

zoning legislation protecting the esthetic values of the Trail in the absence of a zoning ordinance,¹⁴⁵ the Commonwealth Court in *Blue Mountain* avoided placing this heavy, and potentially crippling, burden on local governments. Local governments may be reluctant to enact protective legislation simply because they do not have the resources to litigate land-use appeals resulting from challenges to zoning ordinances. As *Blue Mountain* indicates, the judiciary could provide the safeguard when a municipality fails to enact protective legislation; however, without legislative guidance, effective and consistent implementation of the state policy seems unlikely and improper. This, in turn, creates a substantive due process problem. In other words, by declining to put the duty on the Commonwealth in enacting the Trail Act, did the legislature violate Article I, Section 1, or Article I, Section 27, of the Pennsylvania Constitution?¹⁴⁶

The judiciary's general lack of land-use expertise, coupled with a review process that is often highly deferential to local agencies, requires an entity other than the judiciary to step aggressively into the fray of local land-use politics and promote land-use policies in accordance with a state plan.¹⁴⁷ Ideally, supplemental legislation incorporating the mandate of Section 27, like the Trail Act, would clarify the constitutional provision's general language to provide further safeguards. Even this presumes that local governmental agencies have the capability to effectuate the policy behind Section 27. Rather, the solution to this problem is to subject local land-use decisions to a state agency review process.

VII. Integration into Pennsylvania Policy: State Agency Review

The sheer length of the Trail poses a serious problem of local land-use coordination among the many municipal governments through which the Trail passes. As a state characterized by highly

¹⁴⁵ *Blue Mountain Pres. Ass'n*, 867 A.2d at 703.

¹⁴⁶ Section 1 of Article I of the Pennsylvania Constitution creates the right of "acquiring, possessing, and protecting property" PA. CONST. art. I, § 1. Section 27 of Article I of the Pennsylvania Constitution creates the right "to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." PA. CONST. art. I, § 27.

¹⁴⁷ See Wickersham, *supra* note 143; Singh, *supra* note 142, at 168 (concluding the same in the context of New Jersey's statewide land-use policies).

independent local governments and a tradition of mistrust of government intrusion, Pennsylvania presents a particularly difficult problem from the standpoint of regional and state land-use policy implementation.¹⁴⁸ Limiting the police power of local governments in land-use regulation is the first step to executing a statewide land-use policy, in light of Pennsylvania's governmental fragmentation.¹⁴⁹ Such action is necessary when state and local interests are at odds with respect to land-use or, in the case of Trail protection, when local governmental agencies are incapable or unwilling to effectuate the policy of preserving "natural, scenic, historic and esthetic values of the environment."¹⁵⁰

Several states have enacted some type of statewide growth management statute, which grants various state or regional entities planning authority, thereby guiding growth in a more comprehensive and coherent manner.¹⁵¹ Generally, these statutes require or provide incentives for local governments to create and implement land-use plans which comply with defined state policies, or require state or regional agency review of major projects or critical areas.¹⁵² While Pennsylvania has not enacted a statewide plan to date, the authority of Section 27 puts Pennsylvania in a unique position to enact similar legislation to protect the values listed in the amendment's environmental rights clause.¹⁵³ The Pennsylvania General Assembly should require state agency approval of local government land-use decisions that concern lands within the trailway, which is a historic symbol of environmental

¹⁴⁸ See Ed Bolen et al., *Smart Growth*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 145, 208 (2002) (discussing Pennsylvania's state planning model).

¹⁴⁹ See Singh, *supra* note 142, at 153-156 (discussing various state modes of limiting municipal land-use control). See also James P. Karp, *The Evolving Meaning of Aesthetics in Land-Use Regulation*, 15 COLUM. J. ENVTL. L. 307, 315-17 (1990) (discussing the Hawaii, Montana and Pennsylvania constitutional provisions); Wickersham, *supra* note 143, at 503 (explaining "[t]he use of zoning to defend home rule is linked to the fragmented nature of local government").

¹⁵⁰ PA. CONST. art. I, § 27.

¹⁵¹ See Douglas R. Porter, *State Growth Management: The Intergovernmental Experiment*, 13 PACE L. REV. 481, 483-85 (1993) (discussing growth management acts providing for statewide plans); Wickersham, *supra* note 143, at 512-22 (discussing the growth management programs implemented by Florida and Vermont).

¹⁵² Porter, *supra* note 151, at 489-91; Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 255 (2000); Wickersham, *supra* note 143, at 530.

¹⁵³ See John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part II – Environmental Rights and Public Trust*, 104 DICK. L. REV. 97, 150-51 (1999) (recognizing Section 27 enlarges Pennsylvania's police power).

protection and an enduring source of “natural, scenic, historic and esthetic values of the environment.”¹⁵⁴

A. State Agency Designation, Program Description and Integration

The logical state agency that should accept responsibility for reviewing local government land-use decisions involving trailway lands is the Department of Conservation and Natural Resources (“DCNR”). The General Assembly created the DCNR in 1995 pursuant to the Conservation and Natural Resources Act.¹⁵⁵ The General Assembly’s express purpose in enacting the Conservation and Natural Resources Act was “[t]o create [DCNR] to serve as a cabinet-level advocate for our State parks, forests, rivers, trails, greenways and community recreation and heritage conservation programs to provide more focused management of the Commonwealth's recreation, natural and river environments.”¹⁵⁶ DCNR is charged with administering several statutes that implement Section 27, including the Trail Act.¹⁵⁷

Pennsylvania could benefit from modeling its land-use management program after the aggressive statewide growth management statutes implemented by Vermont and Florida in the 1970s.¹⁵⁸ Both states require approval by a regional or state agency for development projects that meet a certain threshold.¹⁵⁹ In short, Vermont's State Land Use and Development Act of 1970 (“Act 250”)¹⁶⁰ creates a permitting process based on a set of statutorily-specified criteria¹⁶¹ evaluated by a

¹⁵⁴ PA. CONST. art. I, § 27.

¹⁵⁵ Conservation and Natural Resources Act, 1995 Pa. Laws 18 (codified as amended at 71 PA. STAT. ANN. §§ 1340.101-.1103 (West Supp. 1997)). The Pennsylvania General Assembly decided to create the DCNR because it found the structure of the Pennsylvania DEP to impede the department from “solving the problems facing our State parks and forests.” *Id.* at § 1340.101(a)(7).

¹⁵⁶ *Id.* at § 1340.101(b)(1).

¹⁵⁷ See Summary of Major Laws Administered by DCNR, <http://www.dcnr.state.pa.us/legal/majorlaws.aspx> (last visited Nov. 19, 2005) (summarizing major laws administered by DCNR, including the Trails Act).

¹⁵⁸ See Wickersham, *supra* note 143, at 513-518 (discussing the statutes in Florida and Vermont). See also Michael C. Soules, Article, *Constitutional Limitations of State Growth Management Programs*, 18 J. LAND USE & ENVTL. L. 145, 152-154 (2002) (discussing the statutes in Florida).

¹⁵⁹ See Wickersham, *supra* note 143, at 513; Soules, *supra* note 158, at 152-153.

¹⁶⁰ VT. STAT. ANN. tit. 10, §§ 6001-6108 (1997).

¹⁶¹ For example, pursuant to Criterion 8, the proposed development shall “not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.” *Id.* § 6086(a)(8).

three-member district environmental commission.¹⁶² The low threshold of review subjects even moderately small development projects to the permit process.¹⁶³ Further, an Act 250 permit is not a substitute for compliance with other applicable state and local laws.¹⁶⁴ While the commission may reject a project for failing to meet the criteria of Act 250, most projects are accepted and “reshaped” into conformity or have conditions attached to the permits as part of the Act 250 process.¹⁶⁵

The Florida Environmental Land and Water Management Act of 1972 (“ELWMA”) created two growth management tools.¹⁶⁶ First, similar to Vermont’s Act 250 permit system, the statute provided for regulation of any “development of regional impact” (“DRI”).¹⁶⁷ The DRI process differs from Act 250 by regulating only the largest projects, specifically those impacting multiple counties,¹⁶⁸ and by limiting the state planning agency’s role to appealing local government project approvals.¹⁶⁹ The second regulatory tool in the ELWMA allows designation of “areas of critical state concern,” which include, *inter alia*, areas containing “environmental or natural resources of regional or statewide importance.”¹⁷⁰ Once the state planning agency recommends an area of critical concern for designation, the legislature must review the designation.¹⁷¹ After the state planning agency and the legislature designate an area, local governments within that area must conform their land-use regulations and local comprehensive plans with the development principles issued by the state

¹⁶² *Id.* § 6083. See also Michelle Henrie, *Large Development Meets Vermont’s Act 250: Does Phasing Make a Monster or Tame It?*, 23 VT. L. REV. 393, 399 (1998) (discussing Vermont’s permitting process and the district environmental commission).

¹⁶³ Under Act 250, a developer must obtain a permit for construction projects involving ten or more acres, residential construction projects with ten or more units, and construction projects “for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws.” *Id.* § 6001(3)(A)(ii).

¹⁶⁴ *Id.* § 6082.

¹⁶⁵ See Henrie, *supra* note 162, at 399.

¹⁶⁶ Act effective July 1, 1972, ch. 72-317, 1972 Fla. Laws 1162 (codified as amended at FLA. STAT. §§ 380.012-380.12 (2000)).

¹⁶⁷ FLA. STAT. § 380.06 (2000). Due to the success of its statewide planning program, Florida is phasing out its DRI review process as projects located within municipalities whose land-use plan comply with state goals are exempt from DRI review. See Wickersham, *supra* note 143, at 519.

¹⁶⁸ FLA. STAT. § 380.06.

¹⁶⁹ *Id.* § 380.07(2); see also Wickersham, *supra* note 143, at 514-515 (describing appeals process).

¹⁷⁰ *Id.* § 380.05.

¹⁷¹ *Id.* § 380.05(1).

planning agency.¹⁷² Legislatures have used this concept of “areas of critical state concern” in several federal and state contexts.¹⁷³

The Pennsylvania General Assembly should subject land-use and development in the trailway to special planning and regulatory requirements through use of a combination of the growth management tools employed by states such as Vermont and Florida. First, the Pennsylvania legislature should implement a statewide critical resource protection program or growth management statute relating to sustainable development.¹⁷⁴ This would enable the legislature to designate the Trail and the adjoining trailway as an area of critical state concern, forcing municipalities to conform their land-use regulations to legislatively-defined guidelines. While the Trail is only one of many valuable sources of the “natural, scenic, historic and esthetic values of the environment”¹⁷⁵ in Pennsylvania, this action would symbolize a state policy of preserving these values. Second, the legislature should incorporate a two-track permit system under which a developer must receive project permits from local governments and from the DCNR. Also, the threshold for review by the DCNR should be set low to allow maximum protection of the trailway from conflicting land-uses. The legislature should create a list of clearly defined land-uses that conflict with the Trail environment and trigger the permit process. Finally, the legislature should delineate its priorities in order to guide development, avoid conflicts, and encourage coordination between the DCNR and local governments.

Integration of a state planning review process can prove difficult due to the animosities between state and local officials.¹⁷⁶ Moreover, the sheer difficulty of institutional integration between

¹⁷² *Id.* § 380.05(14).

¹⁷³ See Douglas R. Porter, *Reforming Growth Management in the 21st Century: The Metropolitan Imperative*, 12 U. FLA. J.L. & PUB. POL’Y 335, 357 (2001). The American Law Institute’s Model Development Code, published in 1975, proposed the “areas of critical state concern” designation as a means to protect important environmental resources threatened by development. *Id.* States have protected environmental resources of regional importance, such as the New Jersey Pine Barrens, through regulation and enforcement by state or regional agencies. See e.g. Pinelands Protection Act, N.J. STAT. ANN. § 13:18A (West 1998).

¹⁷⁴ See *supra* Section V for discussion of current environmental legislation and policies in Pennsylvania.

¹⁷⁵ PA. CONST. art. I, § 27.

¹⁷⁶ Porter, *supra* note 151, at 494.

the many actors can undermine the process.¹⁷⁷ Florida's growth management program, for example, was undercut by political pressures and administrative shortcomings that led to an often ineffective plan review and approval process¹⁷⁸ and resulted in little use of the critical area provisions.¹⁷⁹ The existing institutional framework¹⁸⁰ in Pennsylvania relating to the Trail, however, may facilitate implementation of the state land-use review process. For much of its history, Trail management has relied upon cooperative partnerships between the local, state and federal governments, non-governmental organizations, and others.¹⁸¹ With this foundation in place, DCNR can focus on building consensus and resolving conflicts, rather than having to coordinate the many hierarchies of decision-makers.

B. Defining the Values and the Lands to be Protected

A primary function of the legislature would be to further define and identify the "natural, scenic, historic and esthetic values" of the Trail and their relationship to surrounding private properties. This task does not come without its share of difficulties. As one commentator opined:

Evidently the framers did not consider aesthetic values to be properly represented by natural, scenic or historic values, but to reflect some other essence. "Natural," "scenic," and "historic" would appear to be sufficient for the protection of the shared human values The values represented by the word "esthetic" could be something broader than shared human values: an overarching convergence of ecological, human and visual concerns.¹⁸²

Notwithstanding the difficulty in defining these values, it simply may be necessary and practical to give their general meanings proper respect. Although the following generalizations by no means represent an exhaustive list, they do provide a starting point for a discussion about trailway protection.

¹⁷⁷ Spyke, *supra* note 130, at 746.

¹⁷⁸ Porter, *supra* note 173, at 348.

¹⁷⁹ Wickersham, *supra* note 143, at 519.

¹⁸⁰ This refers to the vertical and horizontal hierarchies within government. Spyke, *supra* note 130, at 746.

¹⁸¹ See discussion *supra* Section V.

¹⁸² Karp, *supra* note 149, at 327. Karp pointed to case law supporting several different meanings of the term esthetics: a concept generally confined to beauty or to the prevention of nuisances; "a manifestation of shared human values . . . which envelop resources whether they are beautiful or not, harmful or not;" or a broader definition encompassing both human and non-human values, in line with "a conceptualization of a land ethic such as that articulated by Aldo Leopold." *Id.* at 309, 320. In highlighting the recent expansion of esthetic-based regulation, Karp espoused the later definition, which represents an idea that "development should be in harmony with the environment rather than destructive to it." *Id.* at 310.

Natural values encompass both direct uses by humans, such as potable water, and services like recreational opportunities or flood control benefits of wetlands.¹⁸³ Historic values often are connected to feelings of patriotism and the “sense of a place” that a particular place or structure inspires in an individual.¹⁸⁴ Scenic values relate to visual resources such as the beauty found in a landscape or architecture.¹⁸⁵ Esthetic values encompass the spectrum of human senses: seeing, smelling, hearing, touching, and tasting.¹⁸⁶ Protection of esthetic and scenic values is often based on the assumption that both can provide the public with valuable psychological experiences.¹⁸⁷ Not surprisingly, the protection of esthetic and scenic resources coincides with the promotion of tourism.¹⁸⁸

Armed with a better understanding of what each value embodies in the context of the Trail, the legislature should next delineate the buffer corridor of land around the Trail that will be subject to the state agency permitting process. Commentators have suggested that a one mile buffer from the Trail’s centerline could adequately protect the Trail’s scenic values.¹⁸⁹ Perhaps this area would also suffice to protect the other natural, historic and esthetic values of the Trail. Of course, preservation of these values within the trailway will not be absolute. As the Commonwealth Court stated in *Gettysburg*, “[i]t is difficult to conceive of any human activity that does not in some degree impair the natural, scenic and esthetic values of any environment.”¹⁹⁰ However, heightened scrutiny of land-use decisions within the trailway can mitigate and minimize potential impacts to the Trail environment.

VIII. Reconciliation with Private Property Rights

¹⁸³ Dernbach, *supra* note 153, at 143.

¹⁸⁴ Dernbach, *supra* note 153, at 144.

¹⁸⁵ See Dernbach, *supra* note 153, at 144; see also Mark Bobrowski, *Scenic Landscape Protection Under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697, 697-98 (1995) (reaffirming that the “visual landscape rightly has been called our ‘most maligned, ignored, [and] unappreciated natural resource’”).

¹⁸⁶ Dernbach, *supra* note 153, at 144. See also *supra* text accompanying note 180.

¹⁸⁷ Bobrowski, *supra* note 185, at 698.

¹⁸⁸ Bobrowski, *supra* note 185, at 716. See, e.g., *Rotenberg v. City of Fort Pierce*, 202 So. 2d 782, 785-86 (Fla. Dist. Ct. App. 1967) (upholding an esthetic-based zoning regulation and linking it to the city’s tourism industry).

¹⁸⁹ Vinch, *supra* note 113, at 121. See also Bobrowski, *supra* note 185, at 733-36 (discussing efforts to calculate and reduce viewsheds to spatial boundaries); Williams and Ryn-Lincoln, *The Aesthetic Criterion in Vermont's Environmental Law*, 3 HOFSTRA PROP. L.J. 89 (1990) (discussing scenic corridors that have been designated in Vermont).

¹⁹⁰ *Commonwealth v. Nat’l Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 895 (Pa. Commw. Ct. 1973).

While the state agency planning approach will undoubtedly implicate many constitutional issues such as adequate notice, regulatory takings, due process, delegation of power, and standing,¹⁹¹ the fear that the planning approach will erode private property rights is at the heart of the matter.¹⁹² However, like the public's right to the preservation of "natural, scenic, historic and esthetic values of the environment,"¹⁹³ private property rights are not absolute. Courts must weigh public concerns when considering whether a particular regulation unlawfully intrudes on private property rights.¹⁹⁴ Public concern for these environmental values has evolved with changing social values and norms, which are especially evident in the land development context. The current focus on land-use planning and land preservation suggests society has increasingly recognized the essential function served by "certain lands . . . in their natural state."¹⁹⁵ Section 27 supports this proposition.

Historically, courts have been uncomfortable with esthetic land-use regulations due to their inherent subjectivity and the potential for diminishing private property rights for public benefit.¹⁹⁶ In Pennsylvania, the evolution of "natural, scenic, historic and esthetic" land-use regulations reached a historic point with the enactment of the Environmental Rights Amendment. The express recognition of a citizen's right to the preservation of "natural, scenic, historic and esthetic values of the environment" in Section 27 is unique to this day, as only a few other states have similar constitutional provisions.¹⁹⁷ The emergence of these constitutional provisions in several states demonstrated a general trend of judicial acceptance of esthetics alone as being a legitimate purpose of a land-use regulation¹⁹⁸ and a valid exercise of a state's police power.¹⁹⁹ Pennsylvania courts, however, have

¹⁹¹ See Soules, *supra* note 158, at 154-183 (discussing constitutional issues relevant to growth management programs). Constitutional limitations on state regulation of private property include the takings and due process clauses. Dernbach, *supra* note 63, at 713.

¹⁹² Mark W. Cordes, *Property Rights and Land Use Controls: Balancing Private and Public Interest*, 19 N. ILL. U. L. REV. 629, 645 (1999).

¹⁹³ PA. CONST. art. I, § 27.

¹⁹⁴ Cordes, *supra* note 192, at 629. Constitutional limitations on state regulation of private property include the takings and due process clauses. Dernbach, *supra* note 63, at 8.

¹⁹⁵ Cordes, *supra* note 192, at 629.

¹⁹⁶ Karp, *supra* note 149, at 310.

¹⁹⁷ *Id.* at 310 (discussing the Hawaii, Montana and Pennsylvania constitutional provisions).

¹⁹⁸ See *id.* at 307-315 (summarizing the history of esthetic land-use regulation).

consistently held that Section 27 allows for “normal” development.²⁰⁰ This concept of “normal” simply does not sufficiently protect exceptional natural resources such as the Trail.

The struggle to balance public and private rights does not necessarily amount to a standoff between government regulation and property rights, but may rather become an opportunity to reconsider the tension within the Pennsylvania constitution.²⁰¹ Conflicting constitutional provisions should not trump one another but instead should be harmonized.²⁰² Despite the underlying tensions between private and public property rights, the two need not be mutually exclusive. Land-use restrictions also function to enhance property values and guard against conflicting land-uses by other private property owners.²⁰³ Further, by clarifying what the words “natural, scenic, historic and esthetic” mean, the state agency would promote stewardship of these resources²⁰⁴ and, more importantly, shape the reasonable expectations of private property owners regarding potential restrictions in the use of their properties.²⁰⁵ Arguably, landowners in the vicinity of the Trail have been put on notice since legislation has designated the Trail as a national scenic trail and by the continued efforts by various governmental entities, volunteer organizations, and private landowners to protect the Trail.²⁰⁶ Finally, the law tends to lean in favor of public rights over private rights, at least when the property retains some economic vitality and restrictions apply to future uses of land as opposed to current development uses.²⁰⁷

IX. Conclusion

¹⁹⁹ See, e.g., *United Artists' Theater Circuit, Inc.*, 635 A.2d 612, 620 (Pa. 1993).

²⁰⁰ *Blue Mountain Pres. Ass'n*, 867 A.2d at 703 (citing *Payne*, 312 A.2d at 94).

²⁰¹ Section 1 of Article I of the Pennsylvania Constitution creates the right of "acquiring, possessing, and protecting property" PA. CONST. art. I, § 1.

²⁰² Dernbach, *supra* note 63, at 718.

²⁰³ Cordes, *supra* note 192, at 645.

²⁰⁴ Jonathan H. Adler, *Back to the Future of Conservation: Changing Perceptions of Property Rights and Environmental Protection*, 1 N.Y.U. J.L. & LIBERTY (forthcoming 2005), available at <http://ssrn.com/abstract=759653>.

²⁰⁵ Cordes, *supra* note 192, at 653.

²⁰⁶ See discussion *supra* Section IV; see also Donna Jalbert Patalano, Note, *Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines*, 28 B.C. ENVTL. AFF. L. REV. 683 (2001) (discussing the notice problem typically associated with public trust litigation).

²⁰⁷ Cordes, *supra* note 192, at 637 (noting courts are more inclined to protect established uses of property).

Like much of the East Coast, Pennsylvania continues to face mounting pressures of development and sprawl. In light of the Pennsylvania legislature's increased awareness of the state's unique natural resources and the accompanying desire to promote these resources for their potential recreational and outdoor opportunities, providing substantive protection to the "natural, scenic, historic and esthetic values of the environment"²⁰⁸ should be given utmost priority. Section 27 provides the necessary constitutional framework, but further action is needed to accomplish this objective.

In conclusion, the Appalachian Trail is one of Pennsylvania's special resources that contains these environmental values. While the history of the Appalachian Trail reflects a tremendous commitment to stewardship of the land, namely volunteerism and preservation of land in its natural state, the Trail needs an additional safeguard to supplement these continuing traditions and to assist in its protection. Implementing a state agency permit and review process for local government land-use decisions dealing with lands located in the trailway would provide this safeguard. This action would establish a firm policy commitment to lasting protection of some of Pennsylvania's most treasured natural resources.

²⁰⁸ PA. CONST. art. I, § 27.