The Mifflin House: Have bold new powers been granted to the un-bold?

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by

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This past June 20th the Pennsylvania Supreme Court issued [in *Environmental Defense Fund v. PA*] a historic decision upholding the rights of all Pennsylvanians to *"… the preservation of the natural, scenic, historic and aesthetic values of their environment…"* It was the first such majority decision by the state's high court in what is now being characterized as a new era of environmental and preservation law in our state.

The June 20 decision confirmed and locked into place a revolutionary finding in a case decided three and half years ago when the then Supreme Court [in *Robinson Township v. PA*] delivered the first blow to the state's legal foundations and rebirthed the Environmental Rights clause, which up until that point had been kept dormant by forty years of legal shenanigans and neglect.

In the majority opinion issued a few weeks ago – the knockout punch, as it were – was delivered by Judge Christine Donohue when she wrote that the Environmental Rights clause, originally adopted by voters in 1971, is now meant to stand as the equal of "…the most sacred political and individual rights…" that Pennsylvania citizens possess under our state Constitution.

To the average citizen such high and mighty talk of new found rights and earthquake court cases can seem a bit untethered, so let's unpack some of the details of the recent case that Justice Donohue was writing about.

As a result of the Marcellus Shale gas boom the state has been leasing Commonwealth owned lands for profitable fees; in turn, the state Legislature, using its virtually exclusive power to appropriate, has been spending a good deal of this money to shore up the General Fund. And note well that of all the powers the General Assembly possesses it is its power to appropriate that bestows upon it the greatest political leverage – it is the legislature's power to appropriate that causes more than a few House and Senate Members to strut verbally if not physically.

But in the case at hand, when an environmental group filed suit claiming that the Environmental Rights clause requires the revenues from the Marcellus Shale leases to be exclusively spent on environmental programs, the Supreme Court found its own powerful and affirming voice in that very clause. The Court, setting aside many prior decades of deference and non-interference with the Legislature's power to appropriate, ordered the reallocation of all the funds to environmental programs.

Moreover, the Donohue opinion declared that in relation to exercising power over state owned lands, and by extension over land use generally, all governments, both state and local, must not assume to be acting in the role of "proprietor" but rather as "trustee" on behalf of the people. That's like waking up one morning and finding out you are no longer an employee of the company you work for but instead are the owner of the company and that management now has an absolute requirement to operate the business so that its beneficial to you.

When the full import of the June 20 ruling gets communicated down the line into Pennsylvania local government land, a combined total of thousands of counties, cities, boroughs and townships, via the various Harrisburg-based associations that look out for their interests and when this new reality finally reaches the ears of the officials both elected and appointed who sit in the chairs labeled "board members," there are going to be many doubts and suspicions that the June 20 decision truly could have created such an opposite seeming, new reality. But it did and it is bound to have an immediate effect.

Take for example the current controversy in Hellam Township with regard to the Mifflin House, the 1802 farm house which has been authenticated by the National Park Service as a station on the Underground Railroad. This historic site speaks to us today of the valor of both the enslaved African Americans who escaped bondage and also of those who helped them in our nation's long fight to eradicate slavery.

Kinsley Properties, which owns development rights to the Mifflin House property, has presented the township with plans to tear down the historic home and to build a warehouse. The Township zoning officer has however found evidence that the subdivision plan for the property, going back to 1998, calls for the Mifflin House to be preserved. Recently, after arguments by Kinsley Properties for demolition and by the Kreutz Creek Valley Preservation Society for conservation, the Zoning Hearing Board postponed a decision and availed itself of a 30-day delay on the Kinsley application.

Whichever way the zoning hearing board finally rules – and the elected supervisors to follow -- this case is probably headed to the County Common Pleas court and from there likely will be appealed to a state court. But the Kinsley interests should be forewarned that there is a precedent of sorts – more precisely a foreshadowing -- as to how a higher court might rule on a land use aspect of the Environmental Rights clause.

That foreshadowing is in a long footnote to the 2013 Robinson Township opinion by then Chief Justice Ronald Castille. The footnote deals with the infamous Gettysburg Tower, the controversial 300-foot observation tower that was built adjoining the battlefield by a private developer – an "environmental insult" one critic called it – and which had loomed over the sacred battlefield for 26 years before it was torn down.

In his opinion Castille notes that opponents of the tower, on which construction began in 1972, had attempted to invoke the recently adopted Environmental Rights clause but that the courts of that era deemed that despite now being part of the Constitution it was "not self-executing" and needed further enabling language from the Legislature. Justice Castille knocked down that argument in the main body of his opinion as a mere dodge and wrote that the "plain language" of the Environmental Rights clause spoke for itself and needed no other action than the vote of the people to place it in authority. And, moreover, in the footnote in which he looked back at the Gettysburg Tower case he wrote that the decision allowing it to be built was "in error."

During the last 70 years in York County developers have spent nearly 60 of them approaching the average York County suburban township as though they were royalty making demands and in most cases those demands have been met. Only in the last dozen or so years has there been noticeable push back by some elected supervisors and their appointees.

But in the coming period of testing of the newly restored Environmental Rights amendment, in Hellam Township within the next 30 days and subsequently in communities across this County and all of Pennsylvania, local officials will confront the full import of Section 27 of the Constitution and the new and daunting powers it vests with them. For it grants them a great new authority and also a great new responsibility: to act as trustee of the environment on behalf of the people.

Looking ahead, what can we expect? Because of the bold and empowering language of the Constitution, I am one of those who is expecting a lot. But others have warned me to check my optimism -- this is after all still York County they remind me, where the single greatest tool of preservation down through the years has been resistance to change – almost any kind of change. Will the Mifflin House be bulldozed? Or almost as bad, moved to a reservation for the fostering of orphaned historic buildings? We shall soon enough see.

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