



Green Amendment Victories How Green Amendments Are Recognizing & Protecting Environmental Rights



GREEN AMENDMENTS
FOR THE GENERATIONS
Pure Water. Clean Air. Healthy Environment.

Pennsylvania, Montana, New York, are the only three states in the U.S. that currently promise, protect and respect constitutional environmental rights protected on par with other fundamental human, civil and political rights we hold as inviolate, inherent, inalienable and inalienable rights protected from government infringement and transgression. In this series we share the varied ways that constitutional recognition is providing meaningful and transformative protection in the states where they exist, thereby making the case for constitutional Green Amendments in states across our nation and ultimately at the federal level.

Township of Marple v. Pennsylvania Public Utility Commission
Commonwealth Court of Pennsylvania
Decided March 9, 2023
(No. 319 C.D. 2022, opinion not reported)

PECO proposed to build a natural gas pumping station in Marple Township, Delaware County, Pennsylvania. After entering into an agreement of sale with the property owner, PECO began roadwork and pipeline construction in order to “facilitate a connection” between an existing liquefied natural gas facility and the property at issue, where it proposed to construct its natural gas pumping station facilities, including two buildings and fencing. Thereafter, PECO submitted a zoning application to the Marple Township’s Zoning Hearing Board (ZHB) and applied for a special exception to use the property for the proposed station. (A special exception or variance is when an entity files a petition asking permission to use a zoned parcel of land for their desired purpose, even though it is currently zoned for a different type of purpose.) The ZHB determined PECO was not entitled to the special exception and denied the zoning application.

Thereafter, PECO filed a petition with the Pennsylvania Public Utilities Commission (PUC) and requested a determination that all elements of the project were reasonably necessary for the convenience or welfare of the public. If PECO could show that its proposed facilities met this standard pursuant to section 619 of the Municipalities Planning Code (MPC), the project would be exempt from Township zoning authority.

The PUC Administrative Law Judges (ALJs) determined the proposed project buildings were reasonably necessary for the public convenience or welfare; that the scope of the PUC's inquiry pursuant to section 619 of the MPC was "very limited"; and that as long as PECO operates the proposed facilities in compliance with state and federal regulations, that issues raised by the municipality regarding "noise, gas emissions, aesthetics, traffic and other health and safety concerns were beyond" the PUC's review.

The township appealed the PUC ALJ decision to the Commonwealth Court of Pennsylvania. Among other things, the Township claimed that the PUC erred when it declined to consider the potential negative environmental impacts on the public health, safety and welfare of the proposed project; and it challenged the PUC's finding that the proposed facility was reasonably necessary for the convenience or welfare of the public.

The court confirmed that the state General Assembly had vested the PUC with "preeminent authority to regulate utilities on a statewide basis" and as a result, absent express statutory authority, municipal authority over such facilities is preempted. But, according to the court, the MPC does provide just such express authority. Section 619 expressly gives municipalities the ability to regulate, via local ordinance, the location of a building that a public utility proposes to build or use, unless the PUC determines the proposed or existing building is "reasonably necessary for the convenience or welfare of the public."

The court determined that the two proposed buildings are subject to section 619 of the MPC and therefore subject to local zoning authority with regards to location, unless exempted due to a determination by the PUC that they are reasonably necessary for the convenience or welfare of the public. With regards to the public convenience or welfare decision that determines whether local zoning would be applicable, the court agreed with the township that the PUC had "erred when it flatly deemed environmental concerns to be outside the purview of Section 619 proceedings," and that a blanket deferral to the Pennsylvania Department of Environmental Protection with regards to environmental considerations without any discussion of specific impacts or findings was not appropriate. The court confirmed that deference to other regulatory agencies regarding environmental reviews may be appropriate vis-a-vis deferring to their regulatory authority over such facilities, but that the PUC must also undertake its own specific assessment of the environmental implications of its proposed actions. This may include specific consideration of the findings of other regulatory agencies but cannot be based upon a blanket deference that includes no specific environmental impact considerations or findings.

The court confirmed that the PUC, as is the case with other Pennsylvania government bodies, must ensure that its actions and decisions comply with the constitutional mandates included in Article 1, Section 27 of the Pennsylvania constitution – i.e., Pennsylvania's Environmental Rights Amendment/Green Amendment. This obligation includes assessing the environmental implications of its actions and decisions in order to ensure its proposed action will fulfill the substantive obligations of the constitution to protect the environmental rights of Pennsylvanians and fulfill the natural resources trustee obligations mandated by Article 1, Section 27 of the state constitution.

The court ruled:

“...in proceedings of this nature, the Commission is *obligated* to consider “the environmental impacts of placing [a building] at [a] proposed location,” while also deferring to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters.... The source of the Commission’s responsibility to conduct this type of review in a Section 619 proceeding is not the MPC itself or another statute; rather, it is article I, section 27 of the Pennsylvania Constitution, which is better known as the Environmental Rights Amendment (ERA).”

“In other words, a Section 619 proceeding is constitutionally inadequate unless the Commission completes an appropriately thorough environmental review of a building siting proposal and, in addition, factors the results into its ultimate determination regarding the reasonable necessity of the proposed siting. Here, however, the Commission sidestepped this obligation and, though it stated that it would defer to other agencies’ determinations regarding environmental issues, *failed to identify any such outside agency determinations* that pertained to explosion impact radius, noise, or heater emissions. The Commission’s “deference” in this context thus appears to have been nothing more than illusory and its environmental review substantively nonexistent. This failure renders the Decision entirely deficient from a constitutional standpoint.”

As a result, the court vacated the PUC determination and remanded the matter to the PUC with instructions that it issue an Amended Decision “which must incorporate the results of a constitutionally sound environmental impact review as to the proposed siting on the Property of the Fiber Building and the Station Building.” This holding sends a clear message to the PUC and other Commonwealth agency officials that they must independently and substantially consider the Pennsylvania constitutional Green Amendment (Article 1 Section 27) and the environmental impacts of their projects before they can move forward.