

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**Nos. 2342 CD 2013, 26 CD 2014,
75 CD 2014 and 76 CD 2014**

PETITION OF THE BOROUGH OF DOWNINGTOWN

**BRIEF AMICUS CURIAE OF
PENNSYLVANIA LAND TRUST ASSOCIATION**

**Appeal from the Order of the Court of Common Pleas of Chester County,
Orphan's Court Division, Entered December 20, 2013
Docket No. 1509-0516**

George Jugovic, Jr.
PA ID No. 39586
Citizens for Pennsylvania's Future
200 First Avenue, Suite 200
Pittsburgh, PA 15222

*Counsel for Amicus Curiae
Pennsylvania Land Trust Association*

TABLE OF CONTENTS

TABLE OF CITATIONS	iii
INTRODUCTION	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
1. The DDPA Precludes the Sale of Parcels That Were Obtained Through Condemnation (Parcels Nos. 11-4-14 and 11-4-14.2).....	4
A. The Supreme Court’s Decision in <i>Erie</i> Requires Application of the DDPA to the Southern Parcels.....	4
B. Section 310(a) of the EDC Cannot be Reconciled with Article I, Section 27 of the Pennsylvania Constitution	12
2. The DDPA Governs the Sale of Property Purchased In Part With Project 70 Funds and Subsequently Released from those Deed Restrictions (Parcel Nos. 11-4-13 and 40-1-23.1).....	19
A. The DDPA and the Project 70 Act Should Be Applied Independently to the Northern Parcels	20
B. The DDPA Must Be Given Effect Because It Embodies Constitutional Principles Under Article I, Section 27.....	27
CONCLUSION	29

TABLE OF CITATIONS

Cases

<i>Board of Trustees of Philadelphia Museums v. Trustees of the Univ. of Pennsylvania</i> 96 A.2d 123 (1915)	12, 24
<i>City of Huntington Woods v. City of Detroit</i> , 761 N.W.2d 127 (Mich Ct. App. 2008)	25
<i>Commonwealth v. Karetny</i> , 880 A.2d 505 (Pa. 2005)	12
<i>Cozzone v. Workers Comp. Appeal Bd.</i> , 73 A.3d 526 (Pa. 2013)	21
<i>Feldman v. Bd. Of Supervisors of E. Caln Twp.</i> , 48 A.3d 543 (Pa. Cmwlt. 2012)	21
<i>In re Erie Golf Course</i> , 992 A.2d 75 (Pa 2010)	3, 4, 5, 7, 13, 19, 20
<i>In re Erie Golf Course</i> , 963 A.2d 605, 612 (Pa. Cmwlt. 2009)	5
<i>In re Estate of Ryerss</i> , 987 A.2d 1231 (Pa. Cmwlt. 2009)	13, 14, 15, 17
<i>In re Fiori</i> , 673 A.2d 905 (Pa. 1996)	11
<i>In re Petition of the Borough of Downingtown</i> , 2010 Pa. D & C Dec. Lexis 549	16, 18, 20
<i>In re Stevenson</i> , 12 A.3d 273 (Pa. 2010)	11
<i>Kelly v. City of Philadelphia</i> , 115 A.2d 238 (Pa. 1955)	21
<i>Payne v. Kassab</i> , 361 A.2d 263 (Pa. 1976)	14
<i>Pilchesky v. Redevelopment Authority</i> , 941 A.2d 762 (Pa. Cmwlt. 2008)	12, 24, 26
<i>Rescue Army v. Municipal Court</i> , 331 U.S. 549, 91 L.Ed. 1666, 67 S.Ct. 1409 (1947)	11

Robinson Township v. Commonwealth, 83 A.3d 901 (2013) 13, 14, 17

Swartley v. Harris, 40 A.2d 409 (Pa. 1944) 21

White v. Township of Upper St. Clair, 799 A.2d 188 (Pa. Cmwlth. 2002) .. 24

Constitution and Statutes

PA. CONST. Art. I, § 27..... 13

26 Pa.C.S. § 310(a) 10, 16

53 P.S. § 3381 7

53 P.S. § 3382 8

53 P.S. § 3383 22

53 P.S. § 3384 8, 22

53 P.S. § 3385 24

53 P.S. § 3386 7, 8

72 P.S. § 3946.1 21

72 P.S. § 3946.16 21

72 P.S. § 3946.20. 21, 23

Property Donated to Political Subdivisions for Public Use, the Act of
Dec. 15, 1959, P.L. 1772, No. 670..... 7

Other

Broughton, *Analysis of H.B. 958, The Proposed Environmental Declaration of Rights*, 41 Pa. B.A.Q. 421 (June 1970)..... 14

Franklin L. Kury, *The Environmental Rights Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, Villanova Environmental Law Journal, Vol. 1, Issue 1 (January 1, 1991). 13

INTRODUCTION

The Pennsylvania Land Trust Association (“PALTA”) files this brief pursuant to Pa.R.A.P. 531, which provides that anyone interested in the questions in a pending appeal may file a brief amicus curiae regarding those questions without leave of Court.

PALTA consists of seventy-five of Pennsylvania’s most active conservation organizations that collectively seek to conserve Pennsylvania’s special places – the farms, forests, parks and other green spaces – that help to ensure healthy, prosperous and secure communities. PALTA’s member organizations count more than 100,000 Pennsylvanians as members and contributors.

This brief does not discuss each and every issue presented in this appeal. Instead, PALTA limits its argument to those issues of special importance to PALTA, its member organizations, and the public in general.

SUMMARY OF ARGUMENT

This case presents issues of special importance to PALTA, whose member organizations are dedicated to conserving open space for a variety of recreational and other uses, and who work with municipalities across Pennsylvania to develop opportunities for increased protection of open spaces. How this Court harmonizes the Donated and Dedicated Property Act, the Project 70 Land Acquisition and Borrowing Act and the Eminent Code will affect the ability and circumstances

under which PALTA, its member organizations, and citizens across the state can effectively achieve the conservation of public natural resources for this and future generations.

In the first part of its brief, PALTA supports the Orphans' Court's decision that the DDPA applies to the proposed conveyance of the Southern Parcels. PALTA demonstrates that the DDPA was intended to apply the same substantive standards and procedural mechanism to all varieties of dedicated property regardless of whether the dedication is fully realized or uncertain, and whether the property was acquired through donation, purchase, or condemnation. In next section of its brief, PALTA explains that a second reason for construing the DDPA as applying to all varieties of dedicated property, rather than the lesser standard for disposing of public property under the Eminent Domain Code, is that the standard under the Eminent Domain Code fails to satisfy the municipalities' duties as trustee of public natural resources under Article I, Section 27 of the Pennsylvania Constitution.

In the second part of its brief, PALTA demonstrates that the Orphans' Court erred in holding that the Legislature's removal of use restrictions imposed by the Project 70 Act to the Northern Parcels, also removed use restrictions created by the Borough's dedication of that property for public use as park land. The use restrictions under the Project 70 Act serve different interests than those imposed on

the property under the DDPA, and removal of each must be addressed separately in order to give effect to each statute. Furthermore, The DDPA must be given effect because it embodies the constitutional principles of Article I, Section 27, which requires that the Commonwealth conserve and maintain public natural resources.

For these reasons, the Court should determine, based on the Orphans' Court's findings, that the Borough is without authority under the DDPA to alienate the Northern and Southern Parcels.

ARGUMENT

1. **The DDPA Precludes the Sale of Parcels That Were Obtained Through Condemnation (Parcels Nos. 11-4-14 and 11-4-14.2).**

This portion of PALTA's Amicus Curiae brief concerns Parcels No. 11-4-14 and 11-4-14.2, which were acquired by condemnation actions in 1968 and 1975 and make up the southern portion of Kardon Park (the "Southern Parcels"). On remand from this Court, the Orphans' Court properly concluded that the DDPA precludes the Borough from disposing of the Southern Parcels.

A. **The Supreme Court's Decision in *Erie* Requires Application of the DDPA to the Southern Parcels.**

After trial and prior to the Orphans' Court's initial 2010 decision, the Supreme Court issued *In re Erie Golf Course*, 992 A.2d 75 (Pa 2010). Among other things, the Supreme Court held that Section 6 of the DDPA does not wholly exclude dedicated properties acquired by purchase from coverage under the Act. *Id.* at 88. The Orphans' Court followed this Supreme Court precedent in holding that Section 6 of the DDPA does not wholly exclude dedicated properties acquired through condemnation from coverage under the Act. This Court should sustain the Orphans' Court's decision.

In *Erie Golf Course*, the Supreme Court decided "whether the Donated and Dedicated Property Act applies to the sale of a municipal golf course and park." *Id.* at 77. The City had obtained a golf course and park known as the Erie Golf Course

for the payment of one dollar and the assumption of a \$15,000 mortgage. The deed restricted and memorialized the City's commitment to preserve the property as a golf course or park land. After investing several million dollars to renovate the golf course, the City sought to sell the property. *Id.*

The Orphans' Court in *Erie Golf Course* initially rejected application of the DDPA because it narrowly construed the DDPA as applying only to properties offered for dedication where there was no formal record of acceptance. *Id.* at 78. On appeal, this Court rejected such a narrow construction, holding that the DDPA protects the public interest in public trust properties dedicated to parkland and recreational purposes, and regulates any attempt to remove restrictions on the use of such properties, both where there is, and is not, a formal record of acceptance. *In re: Erie Golf Course*, 963 A.2d 605, 612 (Pa. Cmwlth. 2009). The majority of this Court further decided that the Orphans' Court owed substantial deference to the municipality's decision to divert trust property, and that the trial court should have approved the sale of the golf course absent evidence of bad faith or fraud on the part of the trustee. *Id.* at 613.

Reviewing this Court's decision, the Supreme Court was confronted with arguments about whether the DDPA applied to all dedicated properties or only those for which acceptance was unclear, and what role the common law public trust doctrine should play in its decision. While the Supreme Court agreed with

this Court’s holding that Section 2 of the DDPA applied both where the dedication had been accepted and to where there was no formal record of acceptance, it disagreed that the City’s decision to sell the golf course was entitled to substantial deference under the DDPA. The Supreme Court held, instead, that the DDPA granted the Orphans’ Court, and not the trustee, the “controlling discretion” to decide whether trust property should be sold because of “the extraordinary nature of a diversionary remedy impacting important rights and interests . . . of the public.” *Erie Golf Course*, 992 at 87 (Pa 2010) (emphasizing that Section 4 states that the Court will decide whether the municipality may divert trust property and how that may occur).

Finally, the Supreme Court addressed the meaning of Section 6,¹ and whether it excluded purchased property from coverage under the DDPA. The Supreme Court explained that, like donated property, purchased property may be dedicated to a specific public use. If Section 6 were interpreted as excluding purchased property from coverage under the DDPA, however, less flexible common law principles would apply to disposal of the property, which would defeat the DDPA’s purpose of providing for “an orderly disposition of properties”

¹ Section 6 provides: “Nothing in this act shall be construed to limit or affect the control by a political subdivision of public lands or buildings acquired by such political subdivision by purchase or condemnation.” 53 P.S. § 3386.

where they no longer served the purpose for which they were donated or dedicated.

Id. at 88-89.

While the Supreme Court’s decision pertained to purchased land, the wording of Section 6 and the Supreme Court’s reasoning provide no basis for reaching a different conclusion respecting condemned properties.

The DDPA does not distinguish between dedicated property that was purchased and dedicated property that was condemned. 53 P.S. § 3386. Beginning at the beginning, the preamble to the DDPA indicates that the law was intended to provide for the orderly disposition of properties that no longer serve the purposes for which they were acquired, regardless of the manner of acquisition.² *Property Donated to Political Subdivisions for Public Use*, the Act of Dec. 15, 1959, P.L. 1772, No. 670. The definitions of “lands,” “buildings” and “public facilities” – the only three terms defined in the entire statute – make no distinctions based on how the property was acquired. 53 P.S. § 3381. Finally, the provisions that obligate the municipalities to hold and use the properties for their intended purpose, and establish the mechanism for municipalities to apply for relief from those

² The preamble states in full: Providing for the orderly disposition of properties situate within political subdivisions and donated, or otherwise dedicated or offered for dedication, where no formal record appears as to acceptance by the political subdivision, as public parks, squares or similar uses and public buildings, and no longer necessary or practicable for such purposes, and granting orphans' court's jurisdiction with respect thereto.

obligations, make no distinction between properties acquired through purchase versus condemnation. 53 P.S. §§ 3382 and 3384.

Section 6, the only section of the law that makes reference to purchase or condemnation provides:

Nothing in this act shall be construed to limit or affect the control by a political subdivision of public lands or buildings acquired by such political subdivision by *purchase or condemnation*.

53 P.S. § 3386 (emphasis added).

As an initial matter, there is nothing in the plain language of Section 6 that indicates the legislature intended to treat dedicated and purchased property differently than dedicated and condemned property. One of the foundational principles of statutory construction requires that courts give effect to the intention of the General Assembly, and that intent should be ascertained, if possible, from the words used in the statute. *See* 1 Pa. C.S. § 1921(a), (b). On at least one score, the language of Section 6 is unambiguous, which is that the General Assembly did not evidence an intent to treat public lands or buildings differently depending on whether they were “acquired . . . by purchase or condemnation.” 53 P.S. § 3386. As a result, the Supreme Court’s decision in *Erie Golf Course* that the DDPA governs disposition of dedicated property acquired by *purchase* applies with equal force to dedicated property acquired by *condemnation*.

Appellants argue to the contrary, that this Court should find evidence, in the language of Section 6, of legislative intent to treat dedicated and condemned property differently than other dedicated properties, including dedicated and purchased property. However, not only can such intent not be ascertained from the plain meaning of the language, such a decision would also violate the rationale that supported the Supreme Court's holding in *Erie Golf Course*.

The Supreme Court explained in *Erie Golf Course* that the DDPA establishes a special standard and process that applies to the disposition of dedicated properties to account for the municipality's role as trustee of those public resources. *Erie Golf Course* 992 A.2d at 87. The DDPA requires that dedicated properties may not be diverted unless continued use of the properties for their original purpose is "no longer practicable or possible and has ceased to serve the public interest." In light of the "extraordinary nature of the diversionary remedy" impacting "important rights and interests ... of the public," the DDPA vests "controlling discretion" in the orphans' court to decide whether the dedicated use is no longer practicable or possible and has ceased to serve the public interest. *Id.* The DDPA thereby establishes that someone other than the municipal trustee determine whether the trustee may be relieved of its fiduciary responsibilities to care for the dedicated property and maintain its dedicated use. The DDPA's substantive standards and procedural mechanism governing alienation provide a

significant, judicial branch check against a municipality's unfettered discretion to dispose of property that has been dedicated to a specific public purpose. For these reasons, the Supreme Court concluded that Section 6 did not intend to treat dedicated property that had been purchased differently than other dedicated property covered by the DDPA.

A similar rationale argues that the special standards and procedures of the DDPA be applied to property dedicated and acquired by condemnation. If the DDPA did not cover condemned properties, the disposal of those properties would be governed by Section 310(a) of the EDC. Under Section 310(a), the municipality may dispose of condemned property when it abandons the purpose for which it was condemned, and so long as the property was owned for the requisite period, which in this case is more than twenty one years. 26 Pa.C.S. § 310(a). Further, under Section 310(a), the municipality decides unilaterally when to divest itself of its public trust responsibilities, without any check on that discretion by the courts or others. *Id.* At its essence, Appellants seek to have this Court find in Section 6 legislative intent for the Borough to be able to exercise largely unfettered discretion to decide when it can discard its public trust responsibilities for dedicated and condemned property, even though it could not do so for dedicated and purchased property. Not only would such a decision fail to give effect to the rationale that supported the Supreme Court's decision in *Erie Golf Course*, it

would establish disparate treatment for a subset of dedicated public trust properties, which is exactly the opposite of the result that the Supreme Court sought to avoid in the *Erie Golf Course* case. For these reasons, this Court should reject Appellant's proposed reading of Section 6 of the DDPA.

As a final matter, this Court should decide the case on the basis of the DDPA and not Section 310(a) of the EDC to avoid having to address a constitutional question. The Supreme Court has restated on many occasions the sound tenet of jurisprudence that courts should avoid constitutional issues when the issue at hand may be decided upon other grounds. *See, e.g., In re Stevenson*, 12 A.3d 273, 275 (Pa. 2010); *Commonwealth v. Karetny*, 880 A.2d 505, 519 (Pa. 2005) (“[T]his Court seeks to avoid constitutional issues if the claim may be resolved on alternative grounds.”); *In re Fiori*, 673 A.2d 905, 909 (Pa. 1996). *See also Rescue Army v. Municipal Court*, 331 U.S. 549, 568-569, 91 L. Ed. 1666, 67 S. Ct. 1409 (1947). Affirming the Orphans' Court's decision that the sale of the Southern Parcels is prohibited by the DDPA would allow this Court to avoid the constitutional question addressed immediately below, *to wit*, whether the sale of dedicated public park land pursuant to Section 310(a) of the EDC violates Article I, Section 27 of the Pennsylvania Constitution.

In consideration of the foregoing, this Court should sustain the Orphans' Court's decision applying the DDPA to the Southern Parcels (Parcels Nos. 11-4-14 and 11-4-14.2).

Section 310(a) of the EDC Cannot be Reconciled with Article I, Section 27 of the Pennsylvania Constitution.

As stated above, if this Court affirms the holding of the Orphans' Court and concludes that the Borough may not divert the Southern Parcels from its public trust resources under the DDPA, then it avoids the constitutional issue of whether disposal of the Southern Parcels under Section 310(a) of the EDC comports with Article I, Section 27 of the Pennsylvania Constitution (the Environmental Rights Amendment). If, on the other hand, this Court determines that the DDPA is inapplicable to the proposed transfer the Southern Parcels, then it must address whether Section 310(a) comports with the principles contained in Article I, Section 27. This brief argues that the transfer of the Southern Parcels under Section 310(a) of the EDC would not satisfy the Borough's constitutional obligations as a trustee of public natural resources under Article I, Section 27.

Pennsylvania Courts have long applied a set of principles known as the public trust doctrine in cases involving the use and disposition of dedicated public properties. *See, e.g., Board of Trustees of Philadelphia Museums v. Trustees of the Univ. of Pennsylvania*, 251 Pa. 115, 96 A. 123 (1915); *Pilchesky v. Redevelopment*

Authority, 941 A.2d 762, 765 (Pa. Cmwlth. 2008) (“this case involves the public trust doctrine”). When discussing the public trust doctrine, these decisions almost uniformly describe the doctrine as part of the “common law.” For example, in *In re Estate of Ryerss*, 987 A.2d 1231 (Pa. Cmwlth. 2009), this Court stated that “the DDPA essentially incorporates the *common law* public trust doctrine,” *id.* at 1241 n. 17 (emphasis added), and the Supreme Court later clarified in *Erie Golf Course* that “[t]o the extent the [DDPA] modifies the public trust doctrine, the prior *common-law* principles are superseded.” *Erie Golf Course*, 992 at 86 n.16 (Pa 2010) (emphasis added). As the Supreme Court recently reminded, however, the public trust doctrine is not merely common law in Pennsylvania, it has a constitutional dimension as well. *Robinson Township v. Commonwealth*, 83 A.3d 901, 953-954 (2013).

Article I, Section 27 of the Pennsylvania Constitution provides:

Natural Resources and the Public Estate. 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.

PA. CONST. Art. I, § 27.

The Amendment was unanimously approved by both houses of the General Assembly in the 1971-72 Legislative Session and approved by a four-to-one vote of the citizens of the Commonwealth on May 18, 1971. See Franklin L. Kury, *The*

Environmental Rights Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested, Villanova Environmental Law Journal, Vol. 1, Issue 1 (January 1, 1991). On that date, the status of the public trust doctrine in Pennsylvania was elevated from mere common law principles to *constitutional* law. See Broughton, *Analysis of H.B. 958, The Proposed Environmental Declaration of Rights*, 41 Pa. B.A.Q. 421 (June 1970) (“The second and third sentences of the Amendment firmly put Pennsylvania among the jurisdictions that adhere to the public trust theory of natural resource management, as opposed to the proprietary theory.”); *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976) (Section 27 establishes a public trust with respect to public natural resources and designates the Commonwealth as trustee).

That the Pennsylvania Constitution imposes public trust responsibilities on the Commonwealth has its greatest effect when courts must review a potential conflict between public trust principles and statutory provisions. For while a statute may modify or even supersede common law principles, it cannot supplant principles grounded in the constitution. *Cf. In re Estate of Ryerss*, 987 A. 2d 1231, 1241 n. 17 (Pa. Cmwlth. 2009); *Robinson Township v. Commonwealth*, 83 A.3d 901 (2013). Thus, in this case the proposed alienation of the Southern Parcels under the EDC must be viewed in light of the Borough’s constitutional obligations under Article I, Section 27.

As an initial matter, there should be no question that the Southern Parcels, as part of Kardon Park, constitute a public natural resource within the meaning of Article I, Section 27. As stated in the Supreme Court’s plurality opinion in *Robinson Township*, the concept of public natural resources includes, among other things, publicly-owned lands, *Robinson*, 83 A.3d at 954. Further, this Court has recognized that land dedicated as a municipal park is a classic example of a natural resource governed by public trust principles. *See, e.g., In re Estate of Ryerss*, 987 A. 2d 1231, 1237 n.8, 1241 n. 17 (Pa. Cmwlth. 2009).

The Orphans’ Court’s findings support the proposition that the Southern Parcels were dedicated public open space and park land to which the protections of Article I, Section 27 apply. For example, the Orphans’ Court found that the Dedication of Takings for the Southern Parcels stated that the purpose was to expand and enlarge recreational places and spaces within the Borough; the Southern Parcels were specially named “Morris Kardon Park” in order to resolve a series of legal disputes; the Borough council and Manager participated in a special “dedication” ceremony and posting of a park sign on the Pennsylvania Avenue side of the Southern Parcels; a public parking lot and paved trail were constructed on the eastern side of the Southern Parcels; a public memorial known as the “Victim’s Memorial” was constructed on Parcel 11-14-14.2, and various zoning maps identified the Southern Parcels as part of the “Public Park” zoning district

within the Borough. *In re: Petition of the Borough of Downingtown*, 2010 Pa. D & C Dec. Lexis 549. These findings support a determination that the Southern Parcels constitute public natural resources within the meaning of Article I, Section 27.

Because the Southern Parcels are protected under Article I, Section 27, the Court must then determine whether sale of the Southern Parcels under Section 310(a) of the EDC would comport with the Borough's duties as trustee to conserve and maintain these resources for the benefit of all the people.

Comparing the standard for sale of condemned property under Section 310(a) with the municipal trustee's responsibilities to conserve and maintain public natural resources under the Environmental Rights Amendment, it is evident that the minimal requirements for alienating dedicated properties under Section 310(a) could not pass muster under the Environmental Rights Amendment. Under Section 310(a), all that the municipal trustee would have to do in order to convey dedicated property is change its mind about the use of the property, manifest that changed intention through some action, and wait 21 years. *See* 26 Pa. C.S. § 310(a). Notably, Section 310(a) does not require the municipal trustee to make any effort to conserve and maintain the property, to consider the impact of the sale of the property on the remainder of the trust, or to minimize the harm that disposal

of the trust property would have on the interests of the beneficiaries of the public trust.

The Supreme Court's plurality decision in *Robinson Township* suggests what it means to fulfill the constitutional duty to conserve and maintain the public's natural resources. *Robinson*, 83 A.3d at 957-959. For example, the Court suggests that the trustee must conserve and maintain trust resources, and if using those resources, must consider the effect of use on the beneficiaries' trust interests, and avoid where feasible any harm to those interests. *Id.* However, it is not necessary, for these purposes, to detail each and every condition that must be met to satisfy the municipal trustee's obligations under Article I, Section 27.

What is apparent is that the minimal considerations embodied in Section 310(a) of the EDC fall short of the considerations and standards mandated by the Environmental Rights Amendment.

Pennsylvania courts have recognized that the DDPA incorporated for dedicated property the principal notions of the common law public trust doctrine, *In re Estate of Ryerss*, 987 A.2d at 1241 n. 17., and that the common law public trust doctrine was more stringent than the DDPA. *Erie Golf Course*, 992 A.2d at 86 n.15. Twelve years after enactment of the DDPA, Pennsylvania adopted the Environmental Rights Amendment that, among other things, memorialized the public trust theory for managing public natural resources. It is logical to conclude

that the obligations imposed on trustees under the Environmental Rights Amendment respecting dedicated property are at least as stringent as the standards imposed under the DDPA, *See Erie Golf Course*, 992 A.2d at 86 n.15, which in turn, as demonstrated above, go beyond the requirements of Section 310(a). It follows that merely meeting the minimal requirements of Section 310(a) would not satisfy a municipality's obligations toward dedicated properties under Article I, Section 27.

In this matter, the Orphans' Court has already found that the Southern Parcels do not meet the standard for diversion of trust resources under the DDPA. Among those findings were that the Borough never closed the park; the land use report indicated that despite historic contamination on a part of the property, there was no public health hazard associated with continued use of the property; the Borough continued to maintain the property as a park and recreation area; there was no evidence that it was impossible for the public to continue to use the property as a park and recreation area; and to the extent that the Borough lacked funds to remediate the historic contamination, that did not represent a valid defense. *In re: Petition of the Borough of Downingtown*, 2010 Pa. D & C Dec. Lexis 549.

The Orphans' Court's findings support a determination that not only are the minimal standards under Section 310(a) of the EDC inconsistent with the trustee's

obligations under Article I, Section 27, the proposed alienation of the Southern Parcels itself would be inconsistent with the Borough's obligations as trustee to conserve and maintain the public natural resources under the Pennsylvania Environmental Rights Amendment. As a result, this Court should affirm the decision of the Orphans' Court that the dedicated Southern Parcels may not be sold for private development.

2. The DDPA Governs the Sale of Property Purchased In Part With Project 70 Funds and Subsequently Released from those Deed Restrictions (Parcel Nos. 11-4-13 and 40-1-23.1)

This portion of PALTA's Amicus Curiae brief concerns Parcels No. 11-4-13 and 40-1-23.1, which were purchased, in part, with Project 70 funds and subsequently dedicated to be the northwest portion of Kardon Park (the "Northern Parcels"). The General Assembly subsequently enacted legislation releasing both parcels from the deed restrictions imposed by the Project 70 Act. The Orphans' Court initially found the DDPA controlling and precluded alienation of the Northwest Parcels. This Court vacated and remanded because the Orphans' Court failed to consider the application of the Project 70 Act. On remand, the Orphans' Court incorrectly believed that this Court ruled that the Pennsylvania Legislature's release of a property from Project 70 Act deed restrictions meant that the Southern Parcels could be conveyed, and that the DDPA and common law public trust doctrine had no application. *In re: Petition of the Borough of Downingtown*, 2010

Pa. D & C Dec. Lexis 549. As a result, the Orphans' Court summarily concluded, without substantive analysis, that "since the Pennsylvania Legislature released [the Southern Parcels] from the Project 70 Act deed restrictions, the Borough may dispose of those properties."

A. The DDPA and the Project 70 Act Should Be Applied Independently to the Northern Parcels.

The Orphans' Court improperly determined that the Legislature's release of the Southern Parcels from indenture under the Project 70 Act necessarily precluded application of restrictions under the DDPA to those same parcels.

The Project 70 Act applied alienation restrictions on the Northern Parcels because the Borough used funding from that Act to support, at least partially, the purchase of the parcels. The DDPA also imposed alienation restrictions on the Northern Parcels because, as the Orphans' Court found, the Borough purchased and dedicated the Northern Parcels to the public as part of Karon Park, and the Supreme Court determined that the DDPA applies to purchased property. *Erie*. Because the Orphans' Court had not considered the Project 70 Act, the question presented on remand was whether the application of the Project 70 Act affected application of the DDPA to the Northern Parcels.

The Rules of Statutory Construction provide that when two laws apply to the same subject, they should be read *in pari materia* and not construed as if one part operates to nullify, exclude or cancel the other, unless the statute expressly says so.

1 Pa.C.S. § 1932; *Cozzone v. Workers Comp. Appeal Bd.*, 73 A.3d 526, 536 (Pa. 2013); *Kelly v. City of Philadelphia*, 115 A.2d 238, 245 (Pa. 1955) (“[I]f they can be made to stand together[,] effect should be given to both as far as possible.”); see also *Swartley v. Harris*, 40 A.2d 409, 411 (Pa. 1944) (“It is a fundamental principle that all statutes *in pari materia*, relating to the same subject, shall be construed concurrently when possible . . .”).

The General Assembly enacted the Project 70 Act in 1964 to make funds available for the expansion of outdoor recreational opportunities for Pennsylvanians and otherwise conserve natural areas for public use. 72 P.S. § 3946.1 et seq.; *Feldman v. Bd. Of Sup’rs of E. Caln Twp.*, 48 A.3d 543, 550 (Pa. Cmwlth. 2012). To achieve that end, the Project 70 Act authorized the state to pay up to 50% of the cost of lands to be acquired by political subdivisions of the Commonwealth, 72 P.S. § 3946.16. In return for providing funding assistance, the Project 70 Act restricted alienation of those lands so that they would remain dedicated to recreation, conservation or historic purposes, “unless expressly approved otherwise by the General Assembly.” 72 P.S. § 3946.20. Nothing in the plain language of the Project 70 Act expressly addresses its relationship to the DDPA, or excludes land use restrictions from being applied either through deed or another law.

The DDPA, on the other hand, obligates municipal trustees holding lands dedicated for public use to continue using those lands “for the purpose or purposes for which they were originally dedicated or donated, unless modified by court order. 53 P.S. § 3383. The DDPA establishes a procedure by which municipal trustees may apply to the orphans’ court to alienate dedicated property where continued use of that property for the original purpose is no longer practicable and in the public interest. 52 P.S. § 3384. Nothing in the plain language of the DDPA expressly addresses its relationship to the DDPA, or excludes land use restrictions from being applied either through deed or another law.

Comparing the two, nothing in either law prohibits their simultaneous application the same parcel that was both dedicated to the public purchased with the assistance of funds from the Project 70 Act. Each law provides a mechanism for relieving the restrictions imposed, on the one hand to protect the Commonwealth’s investment in open space and on the other hand, and on the other the public’s right to use property that has been dedicated to it. Under the Project 70 Act, the legislature has the ability to lift the restrictions imposed under that law through a separate enactment. Under the DDPA, the municipal trustee may apply to the orphans’ court for a determination that the land should no longer be used for the purpose for which it was dedicated to the public.

In the instant matter, the Borough sought to remove the restrictions under both laws, using the procedures set forth in each law. The Legislature enacted laws that expressly authorized alienation of the Northern Parcels, but the Borough failed to make the proper demonstration before the Orphans' Court to remove the alienation limitations under the DDPA. While it may not agree with the outcome, the Borough's actions demonstrate that the laws are capable of being applied independently in a manner that fulfills their purposes without one operating to exclude the other.

Furthermore, the restrictions under the DDPA and the Project 70 Act should be applied independently because even though the laws use similar mechanisms, the restrictions protect different interests.

The limit on alienation under the Project 70 Act protects the interests of the Commonwealth in appropriating funds that were specifically intended to increase recreational and outdoor space throughout the Commonwealth. The particular interest of the Commonwealth in the lands continuing to be used for recreational purposes is recognized by the fact that Project 70 Act only authorizes the Commonwealth to enforce the restrictions on alienation, and only the Legislature may lift those restrictions. 72 P.S. § 3946.20(e).

In comparison, the limit on alienation under the DDPA protects the interests of the public to whom the land was dedicated. For that reason, the DDPA provides

that if the municipal trustee seeks a court order to alienate the property “any resident of the political subdivision or any group or organization of residents of the political subdivision.” 53 P.S. § 3385. Importantly, Pennsylvania courts have held even more broadly that, where there has been a dedication of land to a public purpose, and the political subdivision has appropriated money for care and maintenance, every citizen and taxpayer has an interest in the dedication not only by virtue of his being a member of the public to whom the property was dedicated, but also by virtue of his contribution as a taxpayer. *Board of Trustees of the Philadelphia Museums v. Trustees of the University of Pennsylvania*, 96 A. 123 (Pa. 1915); *Pilchesky v. Redevelopment Authority*, 941 A.2d 764 (Pa. Cmwlth. 2008); *White v. Township of Upper St. Clair*, 799 A.2d 188 (Pa. Cmwlth. 2002).

Applying each law independently not only prevents a violation of the Statutory Construction Act, it also gives effect to the intent of both laws by protecting the interests that the laws were written to protect.

The Supreme Court’s decision in *Erie Golf Course* is instructive on whether relief under one law also constitutes relief under the other. The primary focus of the Court’s opinion was use restrictions imposed by the DDPA on the golf course property. However, the property deed also contained a restrictive covenant evidencing the City’s commitment to preserve the parcel as a golf course and park. *Erie Golf Course*, 992 A.2d at 77. After deciding that the DDPA applied to

purchased property, the Supreme Court, while deferring to rule on the issue, recognized as “colorable” the argument that property relieved of restrictions under the DDPA would continue to be burdened by the restrictive covenant providing for public use even if the City obtained relief from the DDPA. *Id.* at 88-89. The Court noted that the DDPA “speaks only to dedications formalized through offer and acceptance, and not to the destruction of independent property rights running with the land.” *Id.* at 89 n. 20. The Court also cited to *City of Huntington Woods v. City of Detroit*, 279 Mich. App. 603, 761 N.W.2d 127, 143 (Mich. Ct. App. 2008), which held that, to the extent a municipality could obtain approval to sell a golf-course/park property, the land would remain burdened by the restrictive covenant providing for public use. *Id.*

This case similarly raises questions about whether a release under the Project 70 Act also operates as a release of use restrictions under the DDPA. In *Erie Golf Course*, the Supreme Court indicated that the language of the DDPA would be relevant to determining the breadth of the release obtained respecting other use restrictions. The language of the Project 70 Act makes no reference to either the DDPA or other use restrictions. The Project 70 Act provides only that “No lands acquired with funds made available under this act shall be disposed of or used for purposes other than those prescribed in this act without the express approval of the General Assembly.” The Project 70 Act makes no mention of the DDPA or the

removal of other use restrictions that may apply to the land. As such, this Court should hold that the Orphans' Court erred in determining that the Legislature's removal of restrictions under the Project 70 Act operated to remove the use restrictions under the DDPA.

In *Pilchesky*, this Court recognized that use restrictions under the Project 70 Act operated independently of use restrictions imposed because of a dedication. 941 A.2d 762 (2008). *Pilchesky* sought to challenge the transfer of a publicly dedicated sports complex to the University of Scranton. The complex had been funded in part with Project 70 money. Subsequently, the Legislature enacted a law removing the Project 70 Act restrictions on the sale of the property. The trial court dismissed *Pilchesky*'s claim based on standing. On appeal, *Pilchesky* maintained that the trial court erred because he had standing to enforce use restrictions that remained under the public trust doctrine.³ This Court reversed the trial court and held that because the complex was dedicated, as a resident and taxpayer, *Pilchesky* had standing to pursue the claim that sale of the Complex was not consistent with the terms of the dedication. As such, this Court recognized that use restrictions that resulted from a dedication of property for public use operated independent of Project 70 Act restrictions.

³ The case was decided before the Supreme Court's decision in *Erie Golf Course*, at a time when this Court had held that the DDPA only applied when there was no clear record of dedication. Therefore, *Pilchesky* had to rely on the common law rather than the DDPA.

The Orphans' Court in this matter initially determined that use restrictions under the DDPA applied to the Northern Parcels, and the Borough did not demonstrate that it was entitled to have the restrictions removed. Upon remand to consider the application of the Project 70 Act, the Orphans' Court held that the Legislature's removal of the Project 70 Act restrictions also removed the restrictions under the DDPA. This Court should correct this plain error of law by holding that use restrictions under the DDPA apply to the Northern Parcels independent of the Project 70 Act, and that the Orphans' Court properly determined that the Borough is without authority to transfer the Northern Parcels.

B. The DDPA Must Be Given Effect Because It Embodies Constitutional Principles Under Article I, Section 27.

As explained above, Article I, Section 27 of the Pennsylvania Constitution imposes obligations on the Borough to hold and conserve public lands in trust for the citizens of the Commonwealth, both present and future generations. In this matter, those principles may be applied through application of the DDPA. If this Court does not give effect to the requirements of the DDPA, it would have to determine whether the Legislature's removal of the Project 70 Act restrictions and transfer of the Northern Parcels violates the Borough's trustee obligations under Article I, Section 27. As with the Southern Parcels, this constitutional decision could be avoided by this Court affirming the Orphans' Court's initial determination

that the DDPA prohibited sale of the Kardon Park property, including the Northern Parcels.

The Orphans' Court's error is apparent from this paragraph:

The Commonwealth Court found that the General Assembly's enactment of Act 29 of 1999 specifically authorizes the Borough's conveyance of parcel 11-4-13 to Developers. The Court found that neither the DDPA nor the *common law public trust doctrine* prohibits the sale of this parcel to Developers.

Slip. Op at 11 (emphasis added).

The Court went on to conclude that the Northern Parcels could be sold because the Legislature had removed the use restrictions from both properties under the Project 70 Act. The Orphans' Court could not reach this conclusion but for the assumption that the public trust doctrine was a common law, and not a constitutional principle in Pennsylvania. While the DDPA may have embodied common law public trust principles in 1959 when it was enacted, at least since 1971 those principles have been elevated to the status of constitutional law in Pennsylvania.

The public trust principles in Article I, Section 27 are at least as stringent as the standard for removal of use restrictions under the DDPA. The Orphans' Court has already concluded, as a matter of fact, that the Borough has not complied with the standard for release of the use restrictions on the Northern Parcels under the DDPA. When the Orphans' Court's determined that the DDPA prohibits the sale of

the Northern Parcels because the Borough trustee failed to demonstrate that the continuing use of the property as initially dedicated is not practicable and in the public interest, the Court effectively determined that the transfer of the property did not comply with the municipal trustee's obligations under Article I, Section 27.

For these reasons, this Court should apply the DDPA to the proposed sale of the Northern Parcels and reinstate the Orphans' Courts initial holding that the DDPA prohibits the sale of the property.

CONCLUSION

Regarding the Southern Parcels, the Orphans' Court properly determined that the DDPA applies to dedicated properties, regardless of whether they were acquired through donation, purchase or condemnation. This decision is consistent with the Supreme Court's decision in *Erie Golf Course*, and affirming that the Borough cannot transfer the Southern Parcels under the DDPA avoids the constitutional question of whether the Eminent Domain Code is consistent with Article I, Section 27 regarding dedicated public trust resources. This Court should affirm the Orphans' Court's order because the Borough did not demonstrate the right to remove the use restrictions afforded the property under the DDPA.

Regarding the Northern Parcels, the Orphans' Court failed to consider that the use restrictions imposed under the Project 70 Act operate independently of the use restrictions under the DDPA. While the Borough obtained legislation releasing

the property from the use restrictions under the Project 70 Act, it failed to demonstrate a right to remove the use restrictions from the Northern Parcels under the DDPA. By discarding the standard and process established under the DDPA, the Orphans' Court failed to consider the municipalities' trustee obligations under Article I, Section 27 of the Pennsylvania Constitution. This Court should hold that the use restrictions under the DDPA apply to the Northern Parcels independent of the Project 70 Act, and, based on the Orphans' Court's prior findings, determine that the Borough failed to demonstrate a right to alienate the property.

Respectfully submitted,

/s/ George Jugovic, Jr.

George Jugovic, Jr.
PA ID No. 39586
Citizens for Pennsylvania's Future
200 First Avenue, Suite 200
Pittsburgh, Pennsylvania 15222
(412) 456-2785

Counsel for Pennsylvania Land
Trust Association

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of April, 2014, deposited the foregoing Notice of Appearance and Amicus Curiae Brief in the U.S. First Class Mail, postage prepaid to the following counsel of record, in satisfaction of the requirements of Pa.R.A.P. 121:

H. Fintan McHugh, Esquire
Petrikin, Wellman, Damico, Brown and Petrosa
109 Chesley Drive
Media, PA 19063
*Counsel for Kim Manufacturing Company
and Stewart Hall, L.P.*

Robert L. Byer and Robert M. Polumbos, Esquire
Duane Morris, L.L.P.
600 Grant St., Suite 5010
Pittsburgh, PA 15219-2802
Counsel for J. Loew & Associates Inc., et al

Patrick M. McKenna, Esquire
Gawthrop Greenwood, PC
17 E. Gay Street, Suite 100
P.O. Box 562
West Chester, PA 19381-0562
Counsel for Borough of Downingtown

Samuel C. Stretton, Esquire
301 South High Street
P. O. Box 3231
West Chester, PA 19381-3231
Counsel for Friends of Kardon Park, et al

Claudia M. Tesoro, David Dembe and Lawrence F. Barth, Esquire
Office of Attorney General
Commonwealth of Pennsylvania
21 South 12th Street, 3rd Floor
Philadelphia, PA 19107-3603
Counsel for Office of Attorney General

/s/ George Jugovic, Jr.

George Jugovic, Jr.