

Business Benefits of the Maine Pine Tree Amendment

The Pine Tree Amendment Will Be Beneficial to Business....

While Declaration of Rights protection for the environment will, at times, add an additional layer of review for business projects, they also provide important protections essential for businesses and developers and their environmental rights and expectations. Constitutional Environmental Rights Amendments on par with our Maine Pine Tree Amendment currently exist in Pennsylvania and Montana and are proving themselves a help to development and business in a number of ways, for example, they are:

- ⇒ Providing a legal tool businesses can use to protect themselves from private rights of action resulting from significant environmental degradation and associated costly liability. Cape-France Enterprises successfully relied upon the MT Environmental Rights Amendment to prevent the government from enforcing a contract that could have resulted in the contamination of an entire town's drinking water supply and cause serious, unanticipated, economic consequences for the company.
- ⇒ Helping businesses and developers secure a more informed and thoughtful local and agency review process that will strengthen the ability to withstand environmental advocacy or legal challenges; identify additional project elements necessary for legal compliance earlier in the process when adjustments are less costly and more achievable; highlighting regulatory, legal, environmental or community hurdles earlier in the process when alternative decisionmaking is more economically viable because it comes before an irretrievable investment of money, time and resources. A Township's rejection of a development project that would have destroyed the last remaining woodlands for a community outside of Philadelphia, relying on local ordinances and the PA Environmental Rights Amendment, helped the developer to avoid significant additional investment in a project that would have significant environmental and community consequences and opposition.
- ⇒ Businesses that depend upon a clean environment and healthy natural resources are benefitted and protected by having their environmental rights recognized, among them: farming, ecotourism, outdoor recreation facilities and associated businesses such as outfitters, bait and tackle shops, industries that require clean water and natural resources to carry out their manufacturing, hotels, motels and restaurants. The Pennsylvania Public Utility Commission utilized the state Environmental Rights Amendment to ensure proper interpretation and application of existing regulation when it rejected two major powerline proposals because of a failure to demonstrate need compounded by serious and well documented harms to a variety of business interests including farming, organic farmers, property values, ecotourism, as well as trout, wildlife and natural habitats that are the underpinning of essential ecotourism in impacted counties.
- ⇒ Ensure that property rights are more robustly protected by ensuring the ecological values of a developer's or individual's property will be protected from unwarranted and harmful land uses on neighboring parcels. The PA Environmental Rights Amendment protected

the zoning authority of local towns regarding heavy industrial fracking operations thereby ensuring that state law could not be used to force industrial fracking in the heart of residential communities where property owners had a clear expectation that neighboring landuses would be residential as opposed to industrial. This is very important for developers who invest heavily in property to support development based on local zoning.

- ⇒ Constitutional Environmental Rights Amendments in Pennsylvania and Montana are helping to ensure government officials are equitably enforcing existing legal environmental protections essential for protecting the rights and investments of individuals, property owners and benefitted businesses. When government fails to enforce existing laws there are not only consequences for the environment and the health and safety of impacted communities, but the investment of business interests can also be significantly undermined. The failure of PA to enforce its Amendment in order to ensure toxic site clean up by responsible parties has not only affected property values, health and safety of neighbors, but is having implications for the future landowner who would like to develop the land but cannot safely do so due to its toxic condition.
- ⇒ While it is true that government's duty to comply with its constitutional obligations are in addition to ensuring compliance with existing law, a significant onslaught of litigation stopping development and business operations is neither anticipated nor what has been experienced in the two states (Pennsylvania and Montana) that have constitutional Environmental Rights Amendments similar to the proposed Pine Tree Amendment and where, on average, the number of cases that include a constitutional environmental rights claims has ranged from 3 to 9.

The Pine Tree Amendment Can Protect Developers and Business Owners From Private Rights of Action and Natural Resource Damages Claims.

Inclusion of environmental rights in the constitution's Declaration of Rights encourages and strengthens government to be proactive in environmental protection, ensuring passage and enforcement of rules, regulations, decisionmaking and actions that protect natural resources and environmental rights, avoiding situations where government protections come too late, after irreversible environmental harm is inflicted on communities and the environment. By ensuring government is more proactive in fulfilling its environmental protection obligations (whether legislating, regulating, permitting, etc.), constitutional Environmental Rights Amendments help protect business interests from causing or contributing to environmental damages that might later become the basis for (a) private rights of action under existing tort, nuisance or other body of law, whereby parties suffering injury or property damage may be entitled to a claim of damages, or (b) Natural Resources Damages claim by responsible government agencies.

In *Cape-France Enterprises v. Estate of Peed*, 29 P.3d 1011, the Montana Environmental Rights Amendment protected Cape-France Enterprises (Cape-France), from fulfilling a contractual obligation to drill a drinking water test well as part of a land deal that, if fulfilled, could have resulted in the contamination of an entire town's drinking water supply and cause serious, unanticipated, economic consequences for Cape-France. Cape-France brought the legal action seeking to rescind the agreement in order to protect itself

from a cascade of economic and legal consequences that would follow if the pollution plume were released.

In the course of reviewing the deal and needed state approvals, the Montana Department of Environmental Quality (DEQ) warned Cape-France that if drilling the agreed upon well caused an expansion of an existing groundwater pollution plume, Cape-France, as the property owner, would be liable for any cleanup costs (costs which could be significant). Among the chemicals in the pollution plume was perchloroethylene (PCE) associated with a variety of health risks including “developmental toxicity, cancer, liver and kidney dysfunction, as well as short- and long-term effects on the nervous system.” Its adverse environmental effects include toxicity to aquatic life such as fish and algae.

The reviewing courts agreed with Cape France that the potential liability, expense, injury and costs of performance of the contract by drilling the well would be extreme and unreasonable. The Montana Supreme Court acknowledged that performance of the well-drilling included “the potential for substantial and unbargained-for damage” involving economic harm in addition to “environmental degradation with consequences extending well beyond the parties' land sale.” The Montana Supreme Court ruled in favor of Cape-France Enterprises, determining that “causing a party to go forward with the performance of a contract where there is a very real possibility of substantial environmental degradation and resultant financial liability for cleanup is not in the public interest . . . and is, most importantly, not in accord with the guarantees and mandates of Montana’s Constitution Article II, Section 3 and Article IX, Section 1”. The court emphasized that for a court to mandate specific performance of the contract would “involve the state itself in violating the public’s Article II, Section 3 fundamental rights to a clean and healthful environment.” As a result, the health and safety of the community and the environment were protected, and Cape-France was protected from significant financial liability for the expected resulting harm.

The Pine Tree Amendment Can Provide Environmental Protection Essential for Business Interests

Many businesses in the state depend upon a clean environment and healthy natural resources and are benefitted and protected by having their environmental rights recognized, among them: farming, ecotourism, outdoor recreation facilities and associated businesses such as outfitters, bait and tackle shops, hotels, motels and restaurants. Property values are also enhanced by healthy nearby woodlands, waterways, and stands of trees. Manufacturing industries and pharmaceutical companies often rely on clean water for successful operations, ensuring clean water that does not need significant treatment before use is an economic benefit and cost saver for these benefitted business interests. The Pine Tree Amendment can help protect all of these business interests and property values.

For example, citing applicable regulations and the Pennsylvania Environmental Rights Amendment, a Pennsylvania Public Utility Commission (PAPUC) Administrative Law Judge recommended the denial of needed permitting for construction of two new 230 kV transmission powerlines and associated infrastructure because of significant detrimental economic and environmental impacts on farming, natural springs, trout fishing, property values, an elementary school, tourism, businesses and local government, compounded by a

failure to demonstrate need for the project within the meaning of regulation and law. While the power company was not able to pursue its desired project, many local businesses as well as community tax revenues were protected by the outcome. Among the business and economic harms that were detailed in the ALJ's decision are:

- ⇒ Harm to agricultural vegetable/produce fields causing economic harm to farms that would be cut by the project;
- ⇒ Economic and environmental harm to certified organic farms including from herbicide spraying associated with powerline maintenance, and the potential loss of organic certification;
- ⇒ Lost tourism resulting from harm to community tourist attraction features such as agriculture, wildlife recreation, scenery, animal habitats and historical features;
- ⇒ Harm to historical properties and artifacts, decline in the tourism value of historic properties, and loss of tourism interest and income;
- ⇒ Decline in residential property values as high as 44.9% for properties adjacent to powerlines and 17.9% for non-adjacent properties up to 1,000 feet away; and
- ⇒ Harm to community property tax income due to lower tax assessments for properties adversely impacted by the powerlines.

Notably, demonstrating the important role the legislative branch has in helping, in the first instance, to define the meaning of constitutional environmental rights, and how the constitutional obligation can and should be used to help in the interpretation and application of existing law by agencies and the judiciary, the PAPUC ALJ determined that proper application of existing regulation ensured that it would fulfill its duties as trustee under the state's Environmental Rights Amendment.

The Pine Tree Amendment Will Help Protect Property Rights – Important to Developers and Private Owners

Recognizing environmental rights and the duty of government to protect natural resources for the benefit of all communities provides multiple economic and property values from a developer perspective, among them: ensuring that developer investment in environmental features are protected; protecting property values by ensuring local zoning authority is preserved; ensuring that property rights cannot overshadow the environmental rights and property values of neighboring and nearby communities.

- ✓ Constitutional Environmental Rights protect local environmental protection authority, including zoning, ensuring that developers investing in property for residential or other development projects can count on the use and values zoning protects. In Pennsylvania, Environmental Rights Amendment protections prevented use of a newly passed state law that would supersede local zoning and require heavy industrial fracking in all zoning district, including residential, agriculture and historic, thereby overriding and undermining the use and economic values zoning provided to property owners and developers who had invested based on the zoning. The law was challenged and declared unconstitutional before it was ever implementing, thus preserving the integrity of zoning, property rights, and associated economic values before they could suffer the irreparable harm implementation of the law would cause. (See *Robinson Twp., Delaware Riverkeeper Network v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 954 (2013)).

- ✓ The Pine Tree Amendment will ensure environmental rights are protected on par with property rights thereby helping to ensure the environmental integrity of land is protected from inappropriate neighboring uses that could undermine special environmental values a developer has protected/instilled in project design for increasing property value, sale price and marketability.
- ✓ The Pine Tree Amendment will ensure that consideration of environmental impacts and rights are part of all government decision making as part of the process, thereby helping to ensure that legal challenges to permitting, variances, or other government approvals are in fact more likely to withstand a legal challenge that might ensue. For example, in Pennsylvania in *In re Andover Homeowners' Association, Inc.*, 217 A.3d 906 (Pa. Cmwlth. 2019) one of several claims included a concern that implicated the state's constitutional Environmental Rights Amendment. The court in that case ruled that because a Township had "reasonably account[ed] for the environmental features of the property and, thus, satisfied its obligations under the Environmental Rights Amendment", its decision should be upheld against a homeowners association challenge arguing that the Township violated its constitutional duties when it issued a grading permit for placement of pipelines without properly considering known arsenic contamination on the site. By the township doing a more robust analysis of significant environmental issues, as required by the constitution, the developer was able to better count on the approval they had secured.

The Pine Tree Amendment Will Help Provide a Focus on Prevention of Environmental Harm, Thereby Avoiding Legal Challenges Rather than Encouraging Them.

The Pine Tree Amendment will help ensure that government focus on preventing environmental rights infringement and ensuring necessary natural resource protections are a proactive and upfront part of decisionmaking thereby offering greater clarity earlier in the process to all involved. The Pine Tree Amendment will help secure early and more robust environmental considerations in decisionmaking that can protect developers and business interests by ensuring they are able to better design and site projects in order to ensure needed approvals, or conversely by protecting them from making significant investments in a project that will not ultimately withstand agency and public review.

For example, in Delaware County, PA, Township Commissioners voted unanimously to reject a proposed residential development plan that would clear-cut 89 acres of the last remaining forest of a fast-urbanizing community. Recognizing their constitutional duty to protect the environmental rights of their residents, and their trustee obligation over the natural resources of their community, the township Board of Commissioners quoted the constitution and cited their constitutional obligations when rendering their decision. The end result protected the property values of nearby development while at the same time protecting site developers from incurring significant costs for a project that would later be subject to legitimate challenge.

Constitutional Environmental Rights Amendments Are Not An Impediment to Development and Business Growth; Instead, They Enhance Economic Development By Prioritizing Both Economic Growth and Environmental Protection Equitably.

The Pine Tree Amendment will enhance economic development by encouraging sustainable, environmentally protective, and innovative development, industry, and business growth that both supports jobs and economic growth but at the same time avoids the economic, health

and safety harms that result from environmental pollution and degradation, and associated human health and safety consequences.

As explained by a conservative Pennsylvania Supreme Court Chief Justice when talking about the Pennsylvania Environmental Rights Amendment, Article 1 Section 27:

The Environmental Rights Amendment was not intended to “deprive persons of the use of their property or to derail development leading to an increase in the general welfare, convenience, and prosperity of the people.”

And the “Environmental Rights Amendment does not call for a stagnant landscape; nor ... for the derailment of economic or social development; nor for a sacrifice of other fundamental values.”

But it does *make clear that* “... to achieve recognition of the environmental rights enumerated ... as ‘inviolable’ necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment. As respects the environment, the state’s plenary police power, which serves to promote said welfare, convenience, and prosperity, must be exercised in a manner that promotes sustainable property use and economic development.”

Robinson Twp., Delaware Riverkeeper Network v. Commonwealth, 623 Pa. 564, 83 A.3d 901, 954 (2013).

Constitutional Environmental Rights Amendments can also be a foundation for advancing positive economic development such as policies, programs, and legislation designed to help advance clean and renewable energy projects.

The Pine Tree Amendment Will Help Ensure Government is Fully and Fairly Fulfilling Its Obligations Essential For Protecting the Rights and Economic Investments of All.

The Pine Tree Amendment will help to ensure government officials are equitably enforcing existing legal environmental protections essential for protecting the rights and investments of individuals, property owners and benefitted businesses. When government fails to enforce existing laws there are not only consequences for the environment and the health and safety of impacted communities, but the investment of business interests can also be significantly undermined.

In Chester County, Pennsylvania, a site known to be highly contaminated with TCE and other dangerous toxins was allowed to languish, unaddressed for over 30 years despite that there were known responsible parties pursuant to state law with significant economic resources who had a legal obligation to cleanup, remediate and mitigate the serious and dangerous site contamination. The failure of the state to enforce existing hazardous site cleanup requirements by holding responsible parties accountable for addressing known site contamination not only allowed a spreading pollution plume to raise serious health, safety and environmental concerns for impacted residents, but it also resulted in a developer purchasing the property for residential housing and incurring costs for a project that could not withstand permitting or public opposition and would have serious consequences on the marketability and market value of any residential housing constructed on site. The 2013 Pennsylvania Supreme Court decision that

provided clarity on the state's obligation to meaningfully protect environmental rights re-focused the government on site cleanup prior to development, ensuring existing state law was fully implemented to hold responsible parties accountable for cleanup of the site's toxic condition, thereby protecting the health and safety of the environment and impacted community members, but also benefitting any present or future property owner in pursuing use of the property.

Lots of Litigation Neither Expected Nor Experienced From Passage of The Pine Tree Amendment.

While it is true that government's duty to comply with its constitutional obligations are in addition to ensuring compliance with existing law, a significant onslaught of litigation stopping development and business operations is neither anticipated nor what has been experienced in the two states (Pennsylvania and Montana) that have constitutional Environmental Rights Amendments on par with the proposed Pine Tree Amendment.

It is important to note that a constitutional challenge is a high hurdle and is not a litigation option lightly selected by ethical attorneys. The majority of cases involving constitutional claims pursued in Pennsylvania and Montana are not cases based solely on the constitutional right, they are cases that would have been pursued regardless of the constitutional amendment; in these cases, the constitutional claim provided additional guidance for the courts in how to best resolve the matter for the best benefit of all involved parties. Notably, the number of cases including constitutional environmental rights claims in Pennsylvania is only between 3 to 9 cases a year, and in Montana the number is on the order of 3 cases a year. In Montana, where the constitutional language has had legal vigor since its passage in 1972, Article 2, Section 3 of the constitution was cited in approximately 134 cases and was only a part of the basis for final decisionmaking in approximately 89 of those cases from 1973 to 2020. In Pennsylvania where a December 2013 case is credited with providing constitutional vigor to Article 1 Section 27 of the state's Declaration of Rights, the environmental rights amendment was only cited in 62 cases between January 1, 2014 and December 31, 2020.