

COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA ENVIRONMENTAL DEFENSE FOUNDATION, :
Petitioner :
 :
 :
v. : **No. 228 M.D. 2012**
COMMONWEALTH OF PENNSYLVANIA, :
And :
GOVERNOR OF PENNSYLVANIA, :
THOMAS W. CORBETT, Jr., in his official :
capacity as GOVERNOR, :
Respondents :

**PETITIONER’S OBJECTIONS TO THE PETITION TO INTERVENE
OF THE PENNSYLVANIA HOUSE AND SENATE
REPUBLICAN CAUCUSES**

Petitioner Pennsylvania Environmental Defense Foundation, by and through Attorney John E. Childe, hereby requests this Honorable Court to deny the Petition for Intervention of the Pennsylvania House and Senate Republican Caucuses (“the Republican Caucuses” or “Caucuses”), based upon the following objections:

Pennsylvania Rule of Civil Procedure, Rule 2327,¹ defines who may intervene. The Rule states, “At any time during the pendency of an action, a person not a party thereto shall be

¹ Pennsylvania Rule of Appellate Procedure 1531(b) requires a person who desires to intervene in an original jurisdiction petition for review to file an application that contains “a concise statement of the interest of the applicant and the grounds upon which intervention is sought.” Pa.R.A.P. 1517 states that “the practice and procedure relating to pleadings in original jurisdiction petition for review practice shall be in accordance with the appropriate Pennsylvania Rules of Civil Procedure, so far as they may be applied. Therefore, rules of intervention in the Pennsylvania Rules of Civil Procedure are applicable to review of the Republican Caucus petition to intervene.

permitted to intervene therein, subject to these rules, if

- (1) The entry of judgment in such action or satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
- (2) Such person is so situated as to be adversely affected by a distribution of property in the custody of the court or of an officer thereof; or
- (3) Such person could have joined as an original party in the action or could have been joined therein; or
- (4) The determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.”

Summary of Caucuses’ Petition

The Republican Caucuses are comprised of the Republican members of the Pennsylvania House and Senate. Caucuses’ Petition, ¶ 1.

The Republican Caucuses have petitioned to intervene to defend the legislative enactments that are the subject to the Constitutional challenges of the Amended Petition For Review. Caucuses’ Petition, ¶¶ 2-6.

The Republican Caucuses assert the following as justification to intervene: “The Caucuses dispute that Article I, Section 27 [of the Pennsylvania Constitution] is self-executing. By Petitioning to Intervene, the Caucuses seek to protect the General Assembly’s legislative power and authority to define the values which Article I, Section 27 seeks to protect and to make budgetary decisions in accord with those values and other constitutional obligations,” citing *Commonwealth v. Nat’l Gettysburg Battlefield Tower, Inc.* 311 A. 2d 588, 595 (Pa. 1973). Caucuses’ Petition, ¶ 7.

The Republican Caucuses also assert that the three prong test set out by this Honorable Court in *Payne v. Kassob*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd* 468 Pa. 226, 361 A.2d 263 (1976), has never been used for and is particularly ill-suited for a judicial determination of the constitutionality of a legislative act. Caucuses' Petition, ¶ 8.

ARGUMENT

The Republican Caucuses' Petition to Intervene must be denied for the following reasons:

1. A Caucus Is Not a "Person"

A legislative caucus is not a "person" within the meaning of Rule 2327. The term "person" includes a corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person. 1 Pa.C.S. § 1991.

A legislative caucus is a **meeting** of supporters or members of a specific political party or movement to plan political strategy, holding discussions designed to prepare members for taking political action, to nominate a candidate or determine a policy,(emphasis added) (65 Pa. C.S.§ 703,"Sunshine Act" ; Black's Law Dictionary; Random House, Revised Edition).

A meeting is not person. A caucus is not an entity recognized by law with sui juris rights and duties. The Republican Caucuses are not the General Assembly. They have no authority to represent the General Assembly. They are not a statutorily designated entity of the Commonwealth of Pennsylvania.

Based on the fact that the Republican Caucuses are not persons they have no standing to intervene in this case under Rule 2327.

2. The Caucuses' Petition Does Not Meet The Conditions of Rule 2327

Even assuming they could be considered “persons” by law, the Republican Caucuses do not come within any of the enumerated conditions of Rule 2327. The Republican Caucuses have the burden to meet the requirements of the rule. *Nemirovsky v. Neirovsky*, 776 A.2d 988, 994 (Pa. Super. 2001). If the Caucuses fail to establish that they are within one of the four conditions of Rule 2327, they must be denied the right to intervene. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Cmwlth Ct. 1999).

The Caucuses have not specified in their Petition which of the conditions of Rule 2327 they meet to be granted intervention. The fact is they cannot meet any of the conditions.

a. No Compliance with Rule 2327(1), (2) or (3)

The Caucuses do not assert that they would be subject to liability upon judgment in this case under Rule 2327(1). Nor do they argue that they would be affected by distribution of property under Rule 2327(2). The only property involved in this case is the natural resources that is the subject of the public trust under Article I Section 27. Nor do they assert that they could have joined as an original party under Rule 2327(3). They could not have. The Caucuses cannot meet any of the conditions set forth in Rule 2327(1), (2) or (3).

b. No Legally Enforceable Interest under Rule 2327(4)

The only possible condition that could apply is Rule 2327(4), which deals with legally enforceable interests. Here, the Caucuses argue that their interests are in determining whether Article I Section 27 is self-enabling, and whether the three prong test enumerated in this Court's Opinion in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), is the proper test to determine if a legislative act is unconstitutional. Neither of these interests are legally enforceable rights. They are questions of law for the court to determine.

The fact that a civil proceeding may have some effect on the proposed intervenor is not sufficient to invoke the “legally enforceable interest” entitling him to intervention. *In re L.J.*, 691 A.2d 520 (Pa. Super. 1997), appeal denied, 699 A.2d 735, 548 Pa. 681. See also *In re Pa. Crime Com’n*, 309 A.2d 401 (Pa. 1973).

c. The Public Natural Resource Trust Of Article I § 27 Is Self-Enabling

The Republican Caucuses’ assertions to the contrary, the question as to whether Article I § 27 is self-enabling as applied to the public natural resources provisions is settled law. Both this Court and the Pennsylvania Supreme Court have determined that Article I Section 27, when dealing with the public trust of Pennsylvania’s natural resources, is self-enabling. In *Payne v. Kassab*, 468 Pa. 226, 242 (1976), the Supreme Court differentiated between applying Article I Section 27 to curtail use of private property and applying it to public natural resources. In *Payne*, the Supreme Court stated:

We see no need, in this case, to explore the difficult terrain of whether the amendment is or is not “self-executing”. That question may be of paramount importance when the Commonwealth as trustee is seeking to curtail or prevent the otherwise entirely legal use of private property on the grounds that the proposed use impinges, in the words of the amendment’s first sentence, on “natural scenic, historic and esthetic values of the environment.” See *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973). Here, however, the shoe is on the other foot, as it were. There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enumerate these broad purposes and establish these relationships; the amendment does so by its own *ipse dixit*.

The question as to whether or not Article I Section 27 is self-enabling is a question the courts have already decided. It is not a legally enforceable right for the legislative caucus to assert.

d. Legislative Ability To Act

The Republican Caucuses argue that if Article I Section 27 is determined to be self-executing then the General Assembly would have “no say over the meaning and application of Article I Section 27. Caucuses’ Petition, ¶ 9. Further, if the *Payne* three pronged test is applied to legislative acts, the Caucuses argue that the General Assembly could not amend its own budgetary and environmental legislation.

But, the legislature has already acted through legislation to implement Article I § 27 to the protection of our natural resources, and specifically to establish protections of those natural resources when leasing State Forest land for oil and gas extraction. In 1995 the General Assembly passed the Conservation and Natural Resources Act, Act of July 1, 1995, P.L. 89, No. 18 (71 P.S. §§ 1340.101-1340.1103). In that Act, the General Assembly incorporated Article I Section 27 to define the duties of the newly created Department of Conservation and Recreation (DCNR).² Within those duties, the General Assembly authorized the DCNR Bureau of Forestry to lease State Forest land for oil and gas extraction “whenever it shall appear to the satisfaction of the Department that it would be for the best interests of the Commonwealth to make such disposition of those minerals.” 71 P.S. § 1340.302(a)(6). In addition, the General Assembly transferred to DCNR the powers and duties previously given to the Department of Forests and Waters under the Oil and Gas Lease Fund Act. 71 P.S. § 304(c). The Oil and Gas Lease Fund is to used exclusively for the specific purpose of conservation, recreation and flood control of our natural resources. These statutory provisions have insured the protection of our natural resources as required under the protection of the public trust under Article I § 27.

² In *Belden & Blake v. DCNR*, 600 Pa. 559, 567 (2009), the Pennsylvania Supreme Court stated that “DCNR has a duty to . . . maintain and preserve state parks pursuant to § 303 of the [Conservation and Natural Resources Act], and fiduciary obligations to conserve and maintain them as public natural resources pursuant to *Article I § 27 of the Pennsylvania Constitution.*”

No one has challenged the authority of the General Assembly to enact the provisions of the Conservation and Natural Resources Act enumerated above enabling DCNR to apply Article I § 27 to the leasing of State Forest Land for gas extraction.

But, in 2009 the Governor signed and approved the General Assembly's amendments to the Fiscal Code, which removed the protections from leasing State Forest lands for gas extraction afforded by the Conservation and Natural Resources Act. As a result, Article I Section 27, the Constitutional Amendment, was violated. Neither the General Assembly nor the Governor has the right to violate the Constitution.

3. Adequate Representation

Even if this Court finds a legally enforceable interest under Rule 2327, a mere prima facie basis for intervention is not enough and intervention may be denied if the interest of a petitioner is already adequately represented. Pa. Rule of Civil Procedure 2329(2). *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308 (Pa. Cmwlth. 1999).

In this case the Commonwealth of Pennsylvania is a named Party and is represented by the Attorney General of the Commonwealth. The interests of the Republican Caucuses in intervening in this case are the constitutional challenges to legislative actions that the General Assembly and the Governor passed into law. The Attorney General is statutorily designated to defend the constitutionality of all enactments passed by the General Assembly. 71 P.S. § 732-204(a)(3) ("It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes..."); *see also City of Philadelphia v. Commonwealth.*, 838 A.2d 566, 583 (Pa. 2003). This Court has stated the principle clearly:

In matters such as the one which is now before this Court, there is only one 'Sovereign', and that Sovereign is the Commonwealth of Pennsylvania. When engaged in litigation before this Court, the Sovereign must be of one mind, and,

must speak with one voice. When the Commonwealth acts to protect the public interest, it does so by its Attorney General ...

In re Philadelphia Health Care Trust, 872 A.2d 258, 262 (Pa.Cmwlth. 2005).

The Caucuses' interests are adequately represented herein by the Attorney General of the Commonwealth, the legislatively authorized representative of the Commonwealth to defend the constitutionality of legislative acts.

4. Legislative Standing

The only case cited by the Caucuses in support of their intervention is *Fumo v. City of Philadelphia*, 601 Pa. 322, 339-347, 972 A.2d 487, 497-502 (2009). This case involves the question of legislative standing, not the right to intervention under Pa. R.C.P. 2327.

Fumo is not helpful to the Republican Caucuses. The case does not involve legislative caucuses. The question is whether individual legislators have standing to bring an original action. Arguably, if the Caucuses had the legal standing to represent their individual legislators, and the individual legislators had standing, then they could possibly intervene under Section 3 of Rule 2327.

The "seminal case" in Pennsylvania addressing the standing of a legislator to invoke the authority of the court is *Wilt v. Beal*, 63 A.2d 876, 881 (Pa. Cmwlth. 1976). In that case this Court summarized the test for standing:

What emerges from this review of the federal cases is the principle that legislators, as legislators, are granted standing to challenge executive actions when specific power unique to their functions under the Constitution are diminished or interfered with. Once, however, votes which they are entitled to take have been cast and duly counted, their interest as legislators ceases. Some other nexus must then be found to challenge the allegedly unlawful action.

In this case, the Legislators voted on the amendments to the Fiscal Code stripping DCNR of its authority to protect State Forest while leasing for gas extraction. They voted on the transfer

of all the lease money from the Oil and Gas Lease Fund to the General Fund and the Marcellus Legacy Fund under the Fiscal Code Amendments, the Appropriations Acts and Act 13, stripping DCNR of the ability to mitigate and restore the natural resources impacted by the gas extraction process. All of which the Petitioners herein allege violate Article I Section 27, and are thus unconstitutional. And instead, giving the General Assembly the money from the public trust to use indiscriminately.

Under the Petition to Intervene, the Republican Caucuses now wants to try to defend their votes on the legislation being challenged. The Caucuses want to convince this Court to overturn *Payne v. Kassab* and give the General Assembly control over the meaning of Article I Section 27. Then the Republican Caucuses would have the power to justify the Amendments to the Fiscal Code, the Appropriations Acts, and the Act 13 provisions challenged by the Petitioner. This would result in rendering the public trust provision of Article I Section 27 to be meaningless.

CONCLUSION

For each and all the above objections, the Petitioner Pennsylvania Environmental Defense Foundation respectfully requests this Honorable Court to deny the Caucuses' Petition To Intervene.

John E. Childe
Attorney for Petitioner
I.D. No. 19221
1847 Center Street
Camp Hill, Pa. 17011
717-743-9811
childeje@aol.com