

*11 Pa. Commw. 14, \*; 312 A.2d 86, \*\*;*  
*1973 Pa. Commw. LEXIS 440, \*\*\**

Marion Woodward Payne, Sara Wolfe Bell, Lea M. Csala, Frances Phelps Waller, Rachael W. Gutman, Anthony J. Mussari, Barbara B. Albert, Magdalene Dysleski, Stella M. Moat, Elizabeth C. Miner, George Loveland, Esquire, Carolyn H. Reif, Judith L. Reishtein, Anthony J. Walaitis and Stella Walaitis, his wife, and The Wilkes College Students' Committee for a Clean Environment, by Mark Chamberlain, Trustee Ad Litem, Plaintiffs, v. Jacob G. Kassab, Individually and as Secretary of the Pennsylvania Department of Transportation, and The Commonwealth of Pennsylvania Department of Transportation: City of Wilkes-Barre, John B. McGlynn, Mayor, Marjorie Bart, Robert P. Brader, John V. Morris, Kenneth Remensnyder, Con Salwoski, and Joseph A. Williams, Councilmen of the City of Wilkes-Barre, Luzerne County, Pennsylvania, Defendants

No. 1061 C.D. 1971

Commonwealth Court of Pennsylvania

11 Pa. Commw. 14; 312 A.2d 86; 1973 Pa. Commw. LEXIS 440

September 10, 1973, Argued

November 21, 1973, Decided

**PRIOR HISTORY:**

[\*\*\*1] Original jurisdiction in case of Marion Woodward Payne, Sara Wolfe Bell, Lea M. Csala, Frances Phelps Waller, Rachael W. Gutman, Anthony J. Mussari, Barbara B. Albert, Magdalene Dysleski, Stella M. Moat, Elizabeth C. Miner, George Loveland, Esquire, Carolyn H. Reif, Judith L. Reishtein, Anthony J. Walaitis and Stella Walaitis, his wife, and The Wilkes College Students' Committee for a Clean Environment, by Mark Chamberlain, Trustee Ad Litem v. Jacob G. Kassab, Individually and as Secretary of the Pennsylvania Department of Transportation, and The Commonwealth of Pennsylvania Department of Transportation; City of Wilkes-Barre, John B. McGlynn, Mayor, Marjorie Bart, Robert P. Brader, John V. Morris, Kenneth Remensnyder, Con Salwoski and Joseph A. Williams, Councilmen of the City of Wilkes-Barre, Luzerne County, Pennsylvania.

**DISPOSITION:**

Motion granted. Complaint dismissed.

**COUNSEL:** *F. Charles Petrillo*, with him *James F. Geddes, Jr.*, for plaintiffs.

*Edward V. A. Kussy*, Assistant Attorney General, with him *Charles P. Gelso*, Assistant Attorney General, *Robert W. Cunliffe*, Deputy Attorney General, and *Israel Packel*, Attorney General, for

defendants.

**JUDGES:** President[\*\*\*2] Judge Bowman and Judges Crumlish, Jr., Kramer, Wilkinson, Jr., Mencer, Rogers and Blatt. Adjudication by Judge Mencer. Concurring Opinion by President Judge Bowman. Concurring Opinion by Judge Wilkinson.

**OPINION BY: MENCER**

**OPINION**

[\*16] [\*88] This equity action was initiated by several individual citizens of the City of Wilkes-Barre and a group of students attending Wilkes College in Wilkes-Barre. The named defendants include the Secretary of the [\*17] Pennsylvania Department of Transportation, the Commonwealth of Pennsylvania Department of Transportation, the City of Wilkes-Barre, and the Mayor and Councilmen of the City of Wilkes-Barre. The complaint filed seeks to enjoin the widening of portions of North and South River Streets in Wilkes-Barre.

Under the proposed plans, River Street would be widened to a forty-two-foot four-lane artery for a distance of approximately two-thirds of a mile. As a consequence, there would be an encroachment up to twelve feet at certain points and the taking of approximately one-half acre from lands known as the River Common (Common). Some large trees would be removed and a pedestrian walk would be eliminated.

The Common is presently[\*\*\*3] comprised of about twenty-two acres and is essentially a park area. The original "town plot" of Wilkes-Barre was laid out in 1770 by settlers of the Susquehanna Company who migrated to the Wyoming Valley from the Connecticut Colony. An area along the Susquehanna River was left open and became known as the River Common. During the past two centuries this land has been used for various public events, and historical monuments have been erected on the Common. In 1779 it was the site of encampment of the Clinton-Sullivan Expedition against warring elements of the Iroquois Nation.

In 1806 the Borough of Wilkes-Barre was incorporated and in 1807 the Pennsylvania Legislature dedicated the Common lands between South Street and Union Street for use as a public common. In 1846 the Legislature dedicated the land from Union Street northward to North Street as a public common. The Luzerne County Courthouse is located at the north end of the Common. n1 Kings and Wilkes Colleges are located on [\*18] the east side of River Street, and students from those institutions use the park area of the Common.

----- Footnotes -----1

The authority of the City of Wilkes-Barre to grant to the County of Luzerne the right to build a courthouse on the north portion of the public common was the source of prolonged and bitter legal controversy. See [Bennett v. Norton, 171 Pa. 221, 32 A. 1112 \(1895\)](#); [Mahon v. Norton, 175 Pa. 279, 34 A. 660 \(1896\)](#); [Mahon v. Luzerne County, 197 Pa. 1, 46 A. 894 \(1900\)](#); and [Gumpert v. Hay, 202 Pa. 340, 51 A. 968 \(1902\)](#).

----- End Footnotes-----

[\*\*4] The defendants filed answers, and an evidentiary hearing was held for four days in December 1972. At the completion of this hearing, certain of the defendants made a motion to dismiss. The parties have presented briefs and offered oral argument [\*\*89] before this Court en banc. Upon consideration of the evidence, we make the following

#### Findings of Fact

1. The plaintiffs in this action in equity are Marion Woodward Payne, Sara Wolfe Bell, Lea M. Csala, Frances Phelps Waller, Rachael W. Gutman, Anthony J. Mussari, Barbara B. Albert, Magdalene Dysleski, Stella M. Moat, Elizabeth C. Miner, George Loveland, Esquire, Carolyn H. Reif, Judith L. Reishtein, Anthony J. Walaitis and Stella Walaitis, his wife, all of whom are residents and taxpayers in the City of Wilkes-Barre, Luzerne County, Pennsylvania, and its environs, and the Wilkes College Students' Committee for a Clean Environment, an unincorporated association of Wilkes College students comprising a school sanctioned club at Wilkes College in the City of Wilkes-Barre, Luzerne County, Pennsylvania.

2. The defendants are Jacob G. Kassab, individually and as Secretary of the Pennsylvania Department of Transportation, the[\*\*5] Commonwealth of Pennsylvania Department of Transportation, the City of Wilkes-Barre, and John B. McGlynn, Mayor, Marjorie Bart, Robert P. Brader, John V. Morris, Kenneth Remensnyder, Con Salwoski, and Joseph A. Williams, Councilmen [\*19] of the City of Wilkes-Barre, Luzerne County, Pennsylvania.

3. The action is in the nature of a class action and was brought to enjoin the widening of portions of North and South River Streets in the City of Wilkes-Barre, insofar as the widening project proposed by the defendants encroaches upon lands known as the River Common of the City of Wilkes-Barre.

4. The Pennsylvania Department of Transportation, also called PennDOT, under the Act of May 6, 1970, P.L. 356, §§ 11-18, as amended, 71 P.S. §§ 511-521, has certain powers and duties, including those formerly vested in the Pennsylvania Department of Highways, that encompass the planning and developing of transportation programs and the building, rebuilding, maintenance, widening and construction of State designated highways and rights of way.

5. The City of Wilkes-Barre is a third class city of the Commonwealth of Pennsylvania duly incorporated pursuant to the Act of May 4, 1871, P.L. [\*\*6] 539, of the Pennsylvania Legislature, and operating in accordance with the Third Class City Code, Act of June 23, 1931, P.L. 932, [53 P.S. § 35101 et seq.](#), and under the provisions as well of the Optional Third Class City Charter Law, Act of July 15, 1957, P.L. 901, [53 P.S. § 41101 et seq.](#), all as amended.

6. Dating from about the year 1770, when the original town of Wilkes-Barre was plotted out by settlers of the Susquehanna Company from Connecticut Colony, there has existed a tract of land bordering the Susquehanna River at Wilkes-Barre, consisting originally of approximately thirty-five acres and dedicated and used as a public common.

7. In 1799, while Wilkes-Barre was still a township, the Legislature of the Commonwealth of Pennsylvania, in order to resolve conflicting claims between Pennsylvania and Connecticut settlers and to legalize titles to lands in the area involved, which included the [\*20] then township of Wilkes-Barre, passed an act entitled "An Act for offering compensation to the Pennsylvania claimants of certain lands within the Seventeen Townships in the county of Luzerne, and for other purposes therein mentioned." Act of April 4, 1799, recorded in Law[\*\*\*7] Book Vol. VI, 394, 3 Sm.L. 362.

8. On January 2, 1804, commissioners appointed under the Compensation Act of April 4, 1799, and its supplements, made and returned a survey and issued a certificate to the "township committee," at that time comprised of Matthias Hollenback, Lord Butler, and Jesse Fell, for two tracts of land in the township of Wilkes-Barre, [\*\*90] "one thereof being a square in the town plot thereof and called the Centre Square and the other being the public common on the river bank," and the latter embracing the entire river front from North Street to South Street; which two tracts contained about "thirty-nine acres and forty-one perches, with the usual allowance of six percentum for roads."

9. By the Act of March 17, 1806, recorded in Law Book Vol X, 326, 4 Sm.L. 321, the Borough of Wilkes-Barre was incorporated by the Legislature of the Commonwealth.

10. By Section III, Act of April 9, 1807, recorded in Law Book Vol. XI, 47, 4 Sm.L. 411 (a supplement to the Act of April 4, 1799), the Pennsylvania Legislature dedicated that portion of the River Common along the river front between South and Union Streets for use as a public common in the following manner: [\*\*\*8] "And be it further enacted by the authority aforesaid, That all that certain tract of land fronting the town-lots in the borough of Wilkes-Barre, on the bank of the Susquehanna, extending from the land of Jebez Fish, up the said river, one hundred and ninety-two rods, in a line parallel with the front line of the town-lots, be, and the same hereby is granted and set apart as a public common, and to remain as such for ever."

[\*21] 11. By the Act of March 28, 1846, P.L. 196, § 6, the Pennsylvania Legislature provided: "That all that certain tract of land, fronting the town lots in the borough of Wilkes-Barre, on the bank of the Susquehanna River, extending from the north side of Union street, up the said river, about sixty three rods to the north side of North street, be and the same hereby is granted and set apart as a public common, and to be under the control and jurisdiction of the town council of said borough."

12. By Articles of Agreement made February 8, 1869, and recorded in Luzerne County Deed Book 141 at page 276, and by Indenture made May 16, 1870, and recorded in Luzerne County Deed Book 141 at page 278, the Trustees of the Properties of the Borough and Township[\*\*\*9] of Wilkes-Barre, successors to the former Township Committee, did convey the two tracts of land, being the Public Square and the River Common, to the Burgess and Town Council of the Borough of Wilkes-Barre.

13. By patent issued from the Land Department of the Commonwealth of Pennsylvania on January 10, 1870, and recorded in Luzerne County Deed Book 170 at page 240, and upon the payment of the sum of \$ 207.39, the two tracts of land, namely the Public Square and Public

Common (River Common), were granted to the Burgess and Town Council of the Borough of Wilkes-Barre.

14. The Borough of Wilkes-Barre became an incorporated city of the Commonwealth of Pennsylvania pursuant to the Act of May 4, 1871, P.L. 539.

15. Prior to 1971, the Commonwealth of Pennsylvania, Department of Highways and/or PennDOT, commenced studies and planning for the widening of Legislative Route Spur 5, which encompasses North and South River Streets in the City of Wilkes-Barre between North and South Streets in that municipality, [\*22] and on April 20, 1971, a public hearing was conducted with reference to the project at which only two proposals for widening were made to the public -- one which would[\*\*\*10] not encroach upon River Common lands on the westerly side of the street, and one which would encroach upon the River Common lands as well as lands of property owners on the easterly side of the street.

16. The proposal recommended by PennDOT would widen North and South River Streets to a four-lane traffic artery, forty-two feet in width, for a distance of approximately two-thirds of a mile, taking [\*\*91] lands from both the easterly and westerly (River Common) sides of the street.

17. River Street is a multilane roadway which passes through the River Common along its eastern side as well as beyond the limits of the park in both a northerly and southerly direction. It varies from three to four lanes along the length of the Common. At South Street, River Street is forty-six feet six inches wide, tapering to forty-two feet in width five hundred feet north of South Street. It is at this point that the proposed project will commence. The existing street continues to gradually narrow down to thirty-two feet at Market Street. North of Market, River Street is thirty feet wide until it gradually widens to thirty-eight feet six inches at North Street. This allows for four lanes[\*\*\*11] of traffic between South Street and Northampton Street and three lanes of traffic for the remainder of the distance.

18. River Street is bordered by tree-lined sidewalks on both sides, and a tree lawn is between these sidewalks and River Street. The trees in both of these tree lawns are in variable conditions. Surveys were made in June of 1970 and again in December of 1972. These surveys showed the trees directly affected by the project: [\*23]

**Condition of Trees**

**Year Total Trees Good Fair Poor Dead**

1970	23	10	5	4	4
1972	20	10	5	3	2

The trees affected were of the following varieties, by the 1970 survey:

<b>Tree</b>	<b>Good Fair Poor Dead</b>			
Elm	4	3	1	3
Norway Maple	4			
Silver Maple	2			

Horse Chestnut	2
Basswood	1

As indicated, the 1972 survey showed three trees had been cut; of these two were dead elms and one was the basswood listed in poor condition in 1970.

19. The River Common is twenty-one and seventenths acres in size and contains numerous walkways and grass lawns abutted by many trees and plants. The limits of the Common are from North Street to South Street and from<sup>[\*\*12]</sup> the Susquehanna River to the property line on the east side of River Street. Within its boundaries are several historical markers and monuments.

20. On the west side of River Street, the side of the River Common, the following significant structures and features may be found: On the corner of North Street and River Street is the front of the Luzerne County Courthouse, with a cement sidewalk and steps leading to the Courthouse. The cement sidewalk continues in a southerly direction to the tracks of the Wyoming Valley Railroad Company. An earthen driveway to the rear of the Courthouse is immediately adjacent to the tracks. Three large trees and the ends of several paths leading into the Common lie just south of the tracks. The sidewalk becomes a cinder walkway for the rest of the length of the project. A low stone <sup>[\*24]</sup> wall divides the area of the cinder walk from the rest of the Common for most of the remaining length of the project. At Market Street, the stone wall terminates and the cinder walk broadens and merges with the sidewalk of the Market Street bridge. Granite railing borders the sidewalk area in the vicinity of this intersection. These facilities are paralleled<sup>[\*\*13]</sup> on the south side of the bridge, where the stone wall begins again. A one-story building with flood protection equipment lies just south of the bridge. The stone wall terminates just south of Northampton Street and there is no divider for the remainder of the Common.

21. On the west side of River Street, there is a concrete sidewalk throughout. North Street, Jackson Street, the railroad tracks, West Union Street, Market Street, Northampton Street, and South Street intersect with River Street. Between North Street and Jackson Street, Luzerne County maintains a parking lot. Kings College lies south of Jackson Street. Various properties, with well established front <sup>[\*\*92]</sup> lawns continue to a point just north of Market Street. At that point, there is a medium-sized hotel (the Hotel Sterling). A gasoline station is on the south side of the intersection. For the remaining length of the project, most of the buildings are residential type structures, many owned by Wilkes College. A Baptist Church lies just south of the Market Street intersection.

22. River Street is now and will continue to be the major access route to the bridges across the Susquehanna River between Wilkes-Barre<sup>[\*\*14]</sup> and the Borough of Kingston.

23. River Street is now and will continue to be an essential link in the transportation system of Wilkes-Barre and Luzerne County.

24. The River Street project has been established as having a high priority by the Lackawanna-Luzerne County Transportation Study which is the official projected <sup>[\*25]</sup> transportation study of the area. This study considered all aspects of growth and development in the area and then

proposed a transportation system sufficient to meet projected needs. The study has been developed through the cooperation of state and local officials, as well as other local participants. It is the result of extensive analysis by professional planners at state and local levels.

25. The Wilkes-Barre City Council, after consideration and reconsideration, approved the project, but, as indicated by a resolution of July 6, 1971, said approval was conditioned upon acceptance by PennDOT of certain recommendations which included, *inter alia*, repairing all telephone poles and wires with underground wires and total reconstruction of River Street.

26. On November 5, 1971, notice was filed that PennDOT had given approval to the Legislative<sup>\*\*\*15</sup> Route 5 Spur (River Street) widening project; and on November 12, 1971, a "finding" was filed that stated in effect that there would be some adverse effect on the River Common park lands but that there was no feasible alternative.

27. In recent times the River Common has been used as an open space and park area; festivals and civil programs are held there; and students from local colleges use the area for study, classes, and recreation.

28. The historical development of the park indicates that the River Common is an area of local historical significance.

29. Two proposals for straightening and realigning River Street were evolved; one would balance the taking on *both* sides of River Street, and the other would take a small amount on the east side of River Street and primarily take from the west side of River Street. The former was "Scheme II," while the latter was labeled "Scheme I" at the public hearing of April 20, 1971.

[\*26] 30. Scheme I was adopted for straightening and realigning River Street.

31. The Commonwealth is removing twenty-three trees of variable quality but replacing them with twenty-eight trees of a quality and size reasonably compatible with<sup>\*\*\*16</sup> transplanting.

32. The cinder walkway and tree lawn between this walkway and the pavement will remain of substantially the same character as that which presently obtains.

33. The parapet and railing along the Market Street bridge will be rebuilt with original material in those areas where the change in the curve requires the moving of the parapets.

34. The stone wall between the Common and the walkway will have to be moved at some locations, but will be rebuilt with existing material. In addition, the wall sustained some damage as a result of the June 1972 flood, and the Department has agreed to make the necessary repairs in conjunction with the project.

[\*\*93] 35. Granite curbing will be used along the edges of paving to improve the appearance of River Street.

36. Two short stone pillars near the railroad tracks with historical markers will be affected by

the construction and will be moved slightly further into the Common. The original material will be retained. There is no historical significance to the specific location of these pillars.

37. The Department of Transportation did consult with the Departments of Environmental Resources, Community Affairs, and~~\*\*\*17~~ Health, the State Planning Board, and the Fish Commission, regarding the location, design, construction or reconstruction of the River Street project, and their suggestions and criticisms were considered.

38. In addition to a required public hearing, held April 20, 1971, officials of the Department of Transportation [\*27] met with individual citizens and groups of citizens on numerous occasions to explain and answer questions on the project.

39. The transcript of the public hearing was analyzed and commented upon by the District Office subsequent to the public hearing. This analysis, as well as the transcript itself, was before the Secretary of Transportation when the Secretary reached his decision to approve construction of the River Street project.

40. The Secretary of Transportation issued his finding, which was published in the Pennsylvania Bulletin and local newspapers, that no feasible and prudent alternative existed and that the project as planned incorporated appropriate environmental safeguards.

41. Since the area was of local historical significance, the Pennsylvania Historical and Museum Commission was consulted. The Department was notified that, after the~~\*\*\*18~~ investigation, the Commission was satisfied with the project.

42. The Department of Transportation did cooperate with other authorities and agencies in the development of the River Street project. The Commonwealth has coordinated this project with the Luzerne County Planning Commission, the Lackawanna-Luzerne Transportation Study, the Wilkes-Barre Redevelopment Authority, the County of Luzerne, and the City of Wilkes-Barre (through the Planning Commission, the Recreation Department, the City Engineer, the City Planner, and the City Council). Numerous changes, suggestions, and even the initial request for the project, were derived from one or more of the foregoing agencies.

43. The nature of River Street will remain substantially the same, and the project will not significantly alter the River Common.

44. The City of Wilkes-Barre has approved the present project. [\*28] Discussion

The River Common is an area of local historical significance and is within the purview of Section 13 of the Act of May 6, 1970, P.L. 356 (Act 120), as amended, [71 P.S. § 512](#), and [Article I, Section 27 of the Pennsylvania Constitution](#). Two important questions confront us in this case.

~~\*\*\*19~~ I THE EFFECT OF [ARTICLE I, SECTION 27 OF THE PENNSYLVANIA CONSTITUTION](#) ON THE RIVER STREET PROJECT



[Article I, Section 27 of the Pennsylvania Constitution](#) states: "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."

**[\*\*94]** In *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commonwealth Ct. 231, [302 A. 2d 886 \(1973\)](#), *aff'd* [454 Pa. 193, 311 A. 2d 588 \(1973\)](#), we held the provisions of this section to be self-executing. n2 Here, plaintiffs urge us to read Article I, Section 27 in absolute terms. Since, admittedly, an historical area will be affected by a widening of River Street, they assert their rights under this section of the Pennsylvania Constitution are violated and the highway project in question must be enjoined.

----- Footnotes -----2

In the Supreme Court's affirmance, by a 5-2 decision, four Justices expressed their views on the question of whether the provisions of [Article I, Section 27 of the Pennsylvania Constitution](#) are self-executing, and they were equally divided on this point. The three other Justices of the Court did not express opinions on this question but supported the affirmance on other considerations.

----- End Footnotes-----

**[\*\*\*20] [\*29]** This Court's awareness of the ramifications of such an absolute interpretation caused us to point out in *Gettysburg* that "[i]t is difficult to conceive of any human activity that does not in some degree impair the natural, scenic and esthetic values of any environment. If the standard of injury to historic values is to be that expressed by the Commonwealth's witnesses as an 'intrusion' or 'distraction,' it becomes difficult to imagine any activity in the vicinity of Gettysburg which would not unconstitutionally harm its historic values." *Id.* at 249, 302 A. 2d at 895.

Likewise, it becomes difficult to imagine any activity in the vicinity of River Street that would not offend the interpretation of Article I, Section 27 which plaintiffs urge upon us. We hold that Section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania. The result of our holding is a controlled development of resources rather than no development.

We must recognize, as a corollary of such a conclusion, that decision makers will**[\*\*\*21]** be faced with the constant and difficult task of weighing conflicting environmental and social concerns in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources.

Judicial review of the endless decisions that will result from such a balancing of environmental and social concerns must be realistic and not merely legalistic. The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural

resources? (2) Does the record demonstrate [\*30] a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Applying this standard here, we reach the conclusion that the defendants' motion to dismiss plaintiffs' complaint should be granted.

Our examination of the record[\*\*\*22] discloses that there has been complete compliance with Act 120, the applicable statute. Act 120 prohibits building or expanding any transportation facility involving a public park or an historical site unless there is no feasible and prudent alternative to the use of such land and such facility is planned and constructed to minimize the harm to the park or historical site. The Secretary of Transportation, based on an adequate record, made specific determinations that the River Street project met these criteria. Act 120 also requires that certain agencies having special expertise in the environmental field be consulted in the planning and construction of transportation facilities. [\*\*95] The record discloses that such was done on this project. A comprehensive public hearing and publication of findings regarding the project, called for by Act 120, were accomplished. Likewise, the River Street project is part of a comprehensive plan and local officials were consulted in the development of the plans, as required by the Act. Finally, the record shows that the Commonwealth gave consideration to the effects of the River Street project on the twenty-three items enumerated in Section[\*\*\*23] 13(b) of Act 120, as amended, [71 P.S. § 512\(b\)](#). n3 We note that the Commonwealth did follow, [\*31] as required by Act 120, the hearing procedures required by the Federal Government for Federal-aid transportation programs. However, there is no requirement that [\*32] the Commonwealth do more than adhere to the Federal procedural requirements applicable to the conduct of hearings. We must on this record conclude that the Commonwealth did comply with the requirements of Act 120 which is the statute applicable here.

----- Footnotes -----3

Section 13(b) reads:

"Upon the submission of the preliminary plan or design to the Department of Transportation for any transportation route or program requiring the acquisition of new or additional right-of-way, the Department of Transportation except in cases involving complaint proceedings under the jurisdiction of the Public Utility Commission shall have the power and its duty shall be to follow the hearing procedures now or hereafter required by the Federal Government for Federal-aid transportation programs pursuant to Titles 23 and 49 of the United States Code as amended and the regulations and procedures thereunder even though the transportation route or program does not contemplate the use of or actually employ Federal funds. At the hearings required by this subsection the Department of Transportation shall consider the following effects of the transportation route or program:

"(1) Residential and neighborhood character and location;

"(2) Conservation including air, erosion, sedimentation, wildlife and general ecology of the area;

- "(3) Noise, and air and water pollution;
- "(4) Multiple use of space;
- "(5) Replacement housing;
- "(6) Displacement of families and businesses;
- "(7) Recreation and parks;
- "(8) Aesthetics;
- "(9) Public health and safety;
- "(10) Fast, safe and efficient transportation;
- "(11) Civil defense;
- "(12) Economic activity;
- "(13) Employment;
- "(14) Fire protection;
- "(15) Public utilities;
- "(16) Religious institutions;
- "(17) Conduct and financing of government including the effect on the local tax base and social service costs;
- "(18) Natural and historic landmarks;
- "(19) Property values;
- "(20) Education, including the disruption of school district operations;
- "(21) Engineering, right-of-way and construction costs of the project and related facilities;
- "(22) Maintenance and operating costs of the project and related facilities;
- "(23) Operation and use of existing transportation routes and programs during construction and after completion.

"At the hearings required by this section, the public officials named in clause (15) of subsection

(a) of this section shall make a report indicating the environmental effects of the proposed transportation route or program. The Department of Transportation shall not construct or reconstruct any portion of the transportation route or program unless the Secretary of Transportation makes a written finding published in the Pennsylvania Bulletin that:

"(1) No adverse environmental effect is likely to result from such transportation route or program; or

"(2) There exists no feasible and prudent alternative to such effect and all reasonable steps have been taken to minimize such effect. For the purpose of this subsection environmental effect shall refer to the effects enumerated in this subsection."

----- End Footnotes-----

[\*\*24] Next, the record establishes the reasonable effort that will be expended to reduce the adverse environmental consequences of the project to a minimum. The replacement of trees, the relandscaping of affected areas, the use of special materials, such as granite curbing, the reuse where possible of existing materials, the preservation of the Courthouse steps, the relocation of historical markers, and the protection of the Common during construction are record examples of such effort which we deem reasonable under the circumstances of this case.

[\*\*96] Finally, the record discloses that an important, favorable, and major change will occur in the movement of traffic in the area of the Common with only a physical taking of between two percent and three percent of the land making up the Common. Further, this land taking will be an extension or widening of the existing roadway and not a new intrusion at a location critical [\*33] to the enjoyment and use of the Common. We hold that the environmental harm and adverse effect of the River Street project on public natural resources are clearly outweighed by the public benefits to be derived from the project.

More significantly, [\*\*25] we find that the River Street project is not constitutionally impermissible under the provisions of [Article I, Section 27 of the Pennsylvania Constitution](#).

## II

### HAVE PAST LEGISLATIVE DEDICATIONS OF THE RIVER COMMON PREVENTED PRESENT STRAIGHTENING AND WIDENING OF RIVER STREET

Since the Common extends in an easterly direction to the property line on the east side of River Street, it follows that River Street has been and is now part of the Common. We are satisfied that a reasonable and minimal widening and improvement of River Street is allowable because such a project is not inconsistent with the original grant that encompassed River Street. In [Commonwealth v. Connellsville Borough, 201 Pa. 154, 160, 50 A. 825, 826 \(1902\)](#), the rule was stated that "[t]he adaptation and use of the ground for one or more public purposes, and its regulation accordingly, are within the discretion of the public authorities so long as they do not transgress the terms or limitations of the original grant."

In [Bernstein v. Pittsburgh, 366 Pa. 200, 77 A. 2d 452 \(1951\)](#), this rule was followed, and a city

was permitted to lease a public outdoor auditorium in a public park to an opera company. [\*\*\*26] In [Shields v. Philadelphia, 405 Pa. 600, 176 A. 2d 697 \(1962\)](#), part of a public park was converted into a Little League baseball field, and this was held not to be an undue departure from the original grant for a public park.

[\*34] In the instant case, the widening of River Street does not alter the character and nature of the Common. The road project does not violate the original grant, since the Common's present features will be retained. We do not have here a taking of public property for private purpose but merely a diversion of a minimal quantum of public land from one public purpose to another public purpose.

We do not find the dedication statutes to have been violated relative to the River Street project. Therefore, we do not consider whether or not Act 120 or the Act of June 1, 1945, P.L. 1242, [36 P.S. § 670-101 et seq.](#), granting the Commonwealth broad powers in regard to maintaining and improving streets, implicitly repealed the restrictive covenants of the dedication statutes. See [Interstate Cemetery Company Appeal, 422 Pa. 594, 222 A. 2d 906 \(1966\)](#).

Plaintiffs' contention that the approval of the City Council of Wilkes-Barre is not valid since it[\*\*\*27] was a conditional approval is without merit. The City Planner and the City Engineer of Wilkes-Barre testified at the hearing and expressed satisfaction with the cooperation the Commonwealth has given the City, and their testimony clearly indicated the City's approval of the project. From the evidence we have specifically found as a fact that the City of Wilkes-Barre has approved the project.

One further matter requires only brief attention. The record does not support the plaintiff's assertion that the Pennsylvania Historical and Museum Commission was not consulted. The correspondence between this Commission and the Department of Transportation which was admitted into evidence establishes just the contrary of plaintiffs' contention in this regard. Any remaining question as to this matter was removed by the testimony of [\*\*97] Edward F. LaFond, Jr., Keeper of the Pennsylvania Register of Historic Sites and Landmarks, [\*35] whose testimony was conclusive as to the Commonwealth's position on this point, although he was called as a witness for the plaintiffs.

Accordingly, we make the following

#### Conclusions of Law

1. The River Common area of the City of Wilkes-Barre[\*\*\*28] is an area with natural, scenic, historic and esthetic values within the contemplation of [Article I, Section 27 of the Pennsylvania Constitution](#).
2. [Article I, Section 27 of the Pennsylvania Constitution](#) is a self-executing provision in accordance with doctrines of public trust and represents a proper exercise of state powers within the scope of the [Ninth Amendment to the United States Constitution](#).
3. The plaintiffs in this action have standing as part of the public and as owners of property

fronting the Common to object to the appropriation of part of the Common for highway purposes.

4. The defendant, the Commonwealth of Pennsylvania Department of Transportation, has complied with all relevant provisions of the Act of May 6, 1970, P.L. 356, § 13, as amended, [71 P.S. § 512](#), in respect to the River Street project in Wilkes-Barre, Pennsylvania.

5. The defendants, Pennsylvania Department of Transportation and City of Wilkes-Barre, are not precluded from utilizing or taking any portion of the River Common for the purposes of highway or road construction or widening by [Article I, Section 27 of the Pennsylvania Constitution](#).

6. The expansion or widening of a legislative[\*\*\*29] route spur for general and commercial traffic is a proper use of common lands within the meaning of the term "public common" and a use not prohibited by the State Legislature in its acts of dedication of the River Common area of the City of Wilkes-Barre.

[\*36] 7. The defendant, the Commonwealth of Pennsylvania Department of Transportation, has complied with the Act of March 4, 1970, P.L. 117, § 1, [71 P.S. § 716\(j\)](#), in that it has properly consulted the Pennsylvania Historical and Museum Commission on the design and location of the River Street widening project.

8. The City of Wilkes-Barre, Pennsylvania, has given sufficient and necessary legal approval in connection with the River Street project.

9. The proposed reconstruction and widening project will not result in an improper and unlawful diversion of use of the Wilkes-Barre River Common lands contrary to acts of the Pennsylvania Legislature and the Pennsylvania Constitution.

10. Plaintiffs' equity suit should be dismissed.

Decree Nisi

And Now, November 21, 1973, motion of defendants, the Commonwealth of Pennsylvania Department of Transportation and the City of Wilkes-Barre, to dismiss plaintiffs' complaint[\*\*\*30] is hereby granted, and plaintiffs' complaint is hereby dismissed, at the cost of the plaintiffs. The Prothonotary shall enter this Decree Nisi and notify the parties, or their counsel, forthwith. If no exceptions hereto are filed within twenty (20) days after the notice of filing hereof, this Decree Nisi shall be entered by the Prothonotary as a final decree.

**CONCUR BY: BOWMAN; WILKINSON**

**CONCUR**

**CONCURRING OPINION BY PRESIDENT JUDGE BOWMAN:**

Again, this Court is confronted with the difficult question of determining whether the provisions of Article I, Section 27, of our Constitution are self-executing. In *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commonwealth Ct. 231, [\*\*98] [302 A. 2d 886 \(1973\)](#), *aff'd* [454 Pa. 193, 311 A. 2d 588 \(1973\)](#), we were not unanimous on this issue. It was my view by [\*37] concurring opinion that the issue did not have to be met in that case.

In this case I fully concur with the result reached by the majority. However, being now squarely faced with the issue here, I must express my view that said provisions are not self-executing for the reasons stated by Mr. Justice O'Brien in the Opinion of the Court and as amplified[\*\*\*31] by Mr. Justice ROBERTS in his Concurring Opinion, affirming this Court in *Gettysburg*.

CONCURRING OPINION BY JUDGE WILKINSON:

I fully concur with the result reached by the majority in the disposition of this case. It is not necessary, however, for this Court to reach and decide the difficult and important question of whether or not the provisions of [Article I, Section 27, of the Pennsylvania Constitution](#) are self-executing. I, therefore, would omit Conclusion of Law No. 2.



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468 Pa. 226, \*; 361 A.2d 263, \*\*;  
1976 Pa. LEXIS 673, \*\*\*; 6 ELR 20796

Marion Woodward PAYNE et al., Appellants, v. Jacob G. KASSAB, Individually and as Secretary of the Pennsylvania Department of Transportation, et al., Appellees. Appeal of Frances Phelps WALLER et al.

Supreme Court of Pennsylvania

468 Pa. 226; 361 A.2d 263; 1976 Pa. LEXIS 673; 6 ELR 20796

June 30, 1975, Argued

July 6, 1976, Decided

**COUNSEL:** [\*\*\*1] James F. Geddes, Jr., Wilkes-Barre, for appellants.

Gregory S. Ghen, Penn DOT-Legal, Harrisburg, for appellee, Jacob G. Kassab, Etc.

Chester B. Muroski, Asst. City Sol., Wilkes-Barre, for appellee, City of Wilkes-Barre.

**JUDGES:** Eagen, O'Brien, Roberts, Pomeroy, Nix and Manderino, JJ. Eagen, J., concurs in the result. Roberts, J., filed a dissenting opinion. Jones, C. J., did not participate in the consideration or decision of this case.

**OPINION BY:** POMEROY

## OPINION

### [\*229] [\*\*264] OPINION OF THE COURT

By means of a complaint in equity filed in the Commonwealth Court, n1 several residents of the City of Wilkes-Barre and a group of students from Wilkes College in Wilkes-Barre have sought to halt a street-widening project proposed by the Pennsylvania Department of Transportation (Penn DOT) for River Street in Wilkes-Barre. After a trial before Judge Mencer sitting as chancellor an adjudication, including a decree nisi, was filed dismissing the complaint. [Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 \(1973\)](#). Plaintiffs' exceptions thereto were dismissed and the decree nisi was made final by the entire court sitting en banc. [Payne v. Kassab, 14 Pa.Cmwlth. 491, 323 A.2d \[\\*\\*\\*2\] 407 \(1974\)](#). This appeal followed. n2

----- Footnotes ----- -1

Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673, No. 223, Art. IV, § 401, 17 P.S. § 211.401 (Supp.1975-1976).2

Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673, No. 223, Art. II, 203, 17 P.S. § 211.203 (Supp.1975-1976).



- - - - - End Footnotes- - - - -

Appellants protest the River Street project because of the allegedly negative impact it will have on the historical, scenic, recreational and environmental values of an area of Wilkes-Barre known as the River Common. The River Common is a tract of approximately thirty-two acres which is bounded on the north and south by North and South Streets respectively, on the west by the Susquehanna River and which has as its eastern boundary the easterly curb of River Street. Approximately eleven acres of the Common area consist of the Luzerne County courthouse, railroad tracks and various streets. [\*230] The remaining twenty-one acres are a tree-lined park area utilized for many and varied recreational and leisure[\*\*\*3] activities. Also contained within the boundaries of the Common are several historical markers and monuments.

As mentioned, River Street, part of the Common since the Common's inception, n3 [\*265] forms the entire eastern boundary of the Common. River Street and the bordering areas are described by the chancellor in uncontested n4 findings of fact as follows:

"17. River Street is a multilane roadway which passes through the River Common along its eastern side as well as beyond the limits of the park in both a northerly and southerly direction. It varies from three to four lanes along the length of the Common. At South Street, River Street is forty-six feet six inches wide, tapering to forty-two feet in width five hundred feet north of South Street. It is at this point that the proposed project will commence. The existing street continues to gradually narrow down to thirty-two feet at Market Street. North of Market, River Street is thirty feet wide until it gradually widens to thirty-eight feet six inches at North Street. This allows for four lanes of traffic between South Street and Northampton Street and three lanes of traffic for the remainder of the distance. [\*\*\*4]

"18. River Street is bordered by tree-lined sidewalks on both sides, and a tree lawn is between these sidewalks and River Street. The trees in both of these tree lawns are in variable conditions. . . .

\* \* \*

"20. On the west side of River Street, the side of the River Common, the following significant structures [\*231] and features may be found: On the corner of North Street and River Street is the front of the Luzerne County Courthouse, with a cement sidewalk and steps leading to the Courthouse. The cement sidewalk continues in a southerly direction to the tracks of the Wyoming Valley Railroad Company. An earthen driveway to the rear of the Courthouse is immediately adjacent to the tracks. Three large trees and the ends of several paths leading into the Common lie just south of the tracks. The sidewalk becomes a cinder walkway for the rest of the length of the project. A low stone wall divides the area of the cinder walk from the rest of the Common for most of the remaining length of the project. At Market Street, the stone wall terminates and the cinder walk broadens and merges with the sidewalk of the Market Street bridge. Granite railing borders the sidewalk area[\*\*\*5] in the vicinity of this intersection. These facilities are paralleled on the south side of the bridge, where the stone wall begins again. A one-story building with flood protection equipment lies just south of the bridge. The stone wall terminates just south of Northampton Street and there is no divider for the remainder of the Common.

"21. On the [east] side of River Street, there is a concrete sidewalk throughout. North Street, Jackson Street, the railroad tracks, West Union Street, Market Street, Northampton

Street, and South Street intersect with River Street. Between North Street and Jackson Street, Luzerne County maintains a parking lot. Kings College lies south of Jackson Street. Various properties, with well established front lawns continue to a point just north of Market Street. At that point, there is a medium-sized hotel (the Hotel Sterling). A gasoline station is on the south side of the intersection. For the remaining length of the project, most of the buildings are residential type structures, many owned [\*232] by Wilkes College. A Baptist Church lies just south of the Market Street intersection."

----- Footnotes ----- -3

See the chancellor's Findings of Fact Nos. 6-14 quoted *infra* at pp. 267, 268. [\*\*\*6]4

Appellants excepted to Finding of Fact No. 21 but only on the basis that the gasoline station referred to no longer exists and that mention of an American Legion Post and Jewish Community Center was not made.

----- End Footnotes-----

As early as 1968, Penn DOT began studying proposals for the improvement of [\*\*266] River Street, n5 which is considered by transportation planners to be an essential link in the regional transportation system of Wilkes-Barre and Luzerne County. n6 Although various plans were considered, only two proposals survived this initial study phase. Those two plans for the straightening and realigning of River Street were presented at a public hearing in Wilkes-Barre on April 20, 1971. The plans differed in that Scheme I involved taking property from both the west or River Common side and the east side of River Street while Scheme II entailed taking of property only from the eastern side of the street. Penn DOT recommended Scheme I because acquisition costs were significantly lower; considerably less local property tax revenue would be lost; successful reconstruction of the disrupted area [\*\*\*7] to its original form seemed more likely; and fewer irremediable negative environmental effects were anticipated.

----- Footnotes ----- -5

The need for improvement of River Street was brought to Penn DOT's (then the Department of Highways) attention by a resolution of the Wilkes-Barre City Council, dated April 7, 1964, which requested a survey and recommendation from Penn DOT with respect to the widening of River Street.<sup>6</sup>

This view was expressed in the Lackawanna-Luzerne Transportation Study conducted by various federal, state and local officials and a copy of which appears in the record of this case. See the chancellor's Finding of Facts Nos. 22-24.

----- End Footnotes-----

Appellants, among others, registered their opposition at the April 20th meeting and argued for either no work at all on River Street, or, in the alternative, for Scheme II, which would not impinge directly upon the River Common. After consultation with various state and local agencies, n7 local officials, n8 and local interest groups n9 [\*233] and further study and modification [\*\*\*8] of Scheme I, Penn DOT announced the adoption of that scheme on November 5, 1971. On November 12, 1971 pursuant to the requirements of the Act of May 6, 1970, P.L. 356, No. 120, [§ 13\(b\)](#) as amended, [71 P.S. § 512\(b\)](#) (Supp. 1975-1976) [Act 120], the Secretary of Penn DOT filed his findings that the approved River Street project would have some adverse effect on the River Common but that no feasible alternative for the needed work existed and all reasonable steps to minimize the adverse effect had been taken. n10

----- Footnotes -----7

Luzerne County Planning Commission, the Lackawanna-Luzerne Transportation Study group, the Wilkes-Barre Redevelopment Authority, the County of Luzerne.<sup>8</sup>

City of Wilkes-Barre: the Planning Commission, the Recreation Department, the City Engineer, the City Planner and the City Council.<sup>9</sup>

Including the Greater Wilkes-Barre Chamber of Commerce and the Wyoming Valley Motor Club.<sup>10</sup>

Both the approval of the plans and the secretary's findings appeared, as required by Act 120, in the Pennsylvania Bulletin. (Vol. 1, No. 73 at 2086; Vol. 1, No. 74 at 2109).

----- End Footnotes-----

**\*\*\*9** The plan envisions the widening and realigning of River Street to a uniform four lane road having a minimum width of forty-two feet and improvement of River Street's intersection with North and South Streets. Land from both sides of River Street will be taken with incursions of up to twelve feet, varying according to the need at various points. The total amount of land from the Common to be diverted to this use is .59 acres. Presently located in the path of the proposed fourth lane are sections of tree lawns and sidewalks. (See the chancellor's Findings of Fact Nos. 18, 20 and 21 quoted above). The plan calls for replacement of these areas once construction of the new lane is finished. The disrupted area will be recurbed and restructured. The tree lawn is to be reconstituted with twenty-eight trees replacing the twenty-three which will be removed. The whole area will be relandscaped and the stone wall bordering the sidewalk on the Common side will be reconstructed with its original materials; recent flood damage to the wall will also be repaired. Two historical markers, the historical **\*234** significance **\*\*267** of which is unrelated to any exact location, will be **\*\*\*10** moved to other points in the Common area. In addition, provision has been made that the entrance steps to the Luzerne County Courthouse at the north end of the Common will be undisturbed, with the necessary widening at that point to be accomplished entirely on the eastern side of River Street.

At the outset, we note that our scope of review is narrowly drawn. Ordinarily, the findings of a chancellor, affirmed by the court en banc, have the effect of a jury verdict and will not be reversed unless a review of the record reveals that they are unsupported by the evidence or predicated upon erroneous inferences and deductions or errors of law. [\*Cohen v. Sabin\*, 452 Pa. 447, 307 A.2d 845 \(1973\)](#); [\*Dozor Agency, Inc. v. Rosenberg\*, 431 Pa. 321, 246 A.2d 330 \(1968\)](#); [\*Onorato v. Wissahickon Park, Inc.\*, 430 Pa. 416, 244 A.2d 22 \(1968\)](#); [\*Schwartz v. Urban Redevelopment Authority of Pittsburgh\*, 416 Pa. 503, 206 A.2d 789 \(1965\)](#). The chancellor has seen and heard the witnesses; if a reading of the record reasonably can be said to yield the conclusions which he has drawn, we may not substitute our judgment for his. [\*Harrisburg School District v. Pennsylvania Interscholastic Athletic Association\*, 453 Pa. 495, 309 A.2d 353 \(1973\)](#); [\*Yugas v. Schmidt\*, 434 Pa. 447, 258 A.2d 616 \(1969\)](#). See 9 Standard Pennsylvania Practice, Ch. 40, §§ 113, 115-117 (1962).

I.

In support of their exceptions to the chancellor's findings of fact and conclusions of law, appellants present three main arguments. They first contend that the proposed widening of River Street is impermissible because it violates the language of the statutory dedications

of the land in question as a public Common. A brief review of the history of the River Common is necessary [\*235] as background for the resolution of this contention. That history is fully set forth in the following uncontested findings of fact of the chancellor:

"6. Dating from about the year 1770, when the original town of Wilkes-Barre was plotted out by settlers of the Susquehanna Company from Connecticut Colony, there has existed a tract of land bordering the Susquehanna River at Wilkes-Barre, consisting originally of approximately thirty-five acres and dedicated and used as a public common.

"7. In 1799, while Wilkes-Barre was still a township, the Legislature of the Commonwealth of Pennsylvania, in order to resolve conflicting [\*\*\*12] claims between Pennsylvania and Connecticut settlers and to legalize titles to lands in the area involved, which included the then township of Wilkes-Barre, passed an act entitled 'An Act for offering compensation to the Pennsylvania claimants of certain lands within the Seventeen Townships in the county of Luzerne, and for other purposes therein mentioned.' Act of April 4, 1799, recorded in Law Book Vol. VI, 394, 3 Sm.L. 362.

"8. On January 2, 1804, commissioners appointed under the Compensation Act of April 4, 1799, and its supplements, made and returned a survey and issued a certificate to the 'township committee,' at that time comprised of Matthias Hollenback, Lord Butler, and Jesse Fell, for two tracts of land in the township of Wilkes-Barre, 'one thereof being a square in the town plot thereof and called the Centre Square and the other being the public common on the river bank,' and the latter embracing the entire river front from North Street to South Street; which two tracts contained about 'thirty-nine acres and forty-one perches, with the usual allowance of six percentum for roads.'

"9. By the Act of March 17, 1806, recorded in Law Book Vol. X, 326, 4 Sm.L. 321, [\*\*268] [\*\*\*13] the Borough of Wilkes-Barre [\*236] was incorporated by the Legislature of the Commonwealth.

"10. By Section III, Act of April 9, 1807, recorded in Law Book Vol. XI, 47, 4 Sm.L. 411 (a supplement to the Act of April 4, 1799), the Pennsylvania Legislature dedicated that portion of the River Common along the river front between South and Union Streets for use as a public common in the following manner: 'And be it further enacted by the authority aforesaid, That all that certain tract of land fronting the town-lots in the borough of Wilkes-Barre, on the bank of the Susquehanna, extending from the land of Jebez Fish, up the said river, one hundred and ninety-two rods, in a line parallel with the front line of the town-lots, be, and the same hereby is granted and set apart as a public common, and to remain as such for ever.'

"11. By the Act of March 28, 1846, P.L. 196, § 6, the Pennsylvania Legislature provided: 'That all that certain tract of land, fronting the town lots in the borough of Wilkes-Barre, on the bank of the Susquehanna River, extending from the north side of Union street, up the said river, about sixty three rods to the north side of North street, be and the same hereby [\*\*\*14] is granted and set apart as a public common, and to be under the control and jurisdiction of the town council of said borough.'

"12. By Articles of Agreement made February 8, 1869, and recorded in Luzerne County Deed Book 141 at page 276, and by Indenture made May 16, 1870, and recorded in Luzerne County Deed Book 141 at page 278, the Trustees of the Properties of the Borough and Township of Wilkes-Barre, successors to the former Township Committee, did convey the two tracts of land, being the Public Square and the River Common, to the Burgess and Town Council of the Borough of Wilkes-Barre.

**[\*237]** "13. By patent issued from the Land Department of the Commonwealth of Pennsylvania on January 10, 1870, and recorded in Luzerne County Deed Book 170 at page 240, and upon the payment of the sum of \$ 207.39, the two tracts of land, namely the Public Square and Public Common (River Common), were granted to the Burgess and Town Council of the Borough of Wilkes-Barre.

"14. The Borough of Wilkes-Barre became an incorporated city of the Commonwealth of Pennsylvania pursuant to the Act of May 4, 1871, P.L. 539."Appellants correctly assert that public officials entrusted with the **[\*\*\*15]** management of land dedicated to the public must not approve uses of the land which transgress the terms or limitations of the original grant. Such action would amount, in effect, to an impermissible revocation of the dedication. See e. g., [Commonwealth v. Connellsville Borough, 201 Pa. 154, 50 A. 825 \(1902\)](#). Cf. [Bruker v. Carlisle Borough, 376 Pa. 330, 102 A.2d 418 \(1954\)](#). The land so dedicated, therefore, may be diverted by the responsible public officials neither to private uses, see, e. g., [Bernstein v. Pittsburgh, 366 Pa. 200, 77 A.2d 452 \(1951\)](#); [Hoffman v. Pittsburgh, 365 Pa. 386, 75 A.2d 649 \(1950\)](#); [Trustees of the Philadelphia Museum v. Trustees of the University of Pennsylvania, 251 Pa. 115, 96 A. 123 \(1915\)](#); [Morrow v. Highland Grove Traction Co., 219 Pa. 619, 69 A. 41 \(1908\)](#); [Gumpert v. Hay, 202 Pa. 340, 51 A. 968 \(1902\)](#); [City of Pittsburgh v. Epping-Carpenter Co., 194 Pa. 318, 45 A. 129 \(1900\)](#), nor to public uses not within those designated or specified in the dedicatory language. See cf., [Bruker v. Carlisle Borough, supra](#).

Here, Penn DOT and the City of Wilkes-Barre, the governmental body charged with responsibility for the Common, **[\*\*\*16]** propose no diversion to private use of the .59 acres of the Common required for the project. Clearly, **[\*238]** the planned improvement of River Street are intended for the **[\*\*269]** public benefit and constitute a public use of the land. Appellant's reliance on cases, such as those cited above, which hold that diversion of public land to private use is prohibited, is therefore misplaced. The only question is whether the proposed new public use is proscribed by the dedicatory language.

Restrictions on use contained in statutory grants are to be strictly construed. [Bernstein v. Pittsburgh, supra, 366 Pa. at 205-206, 77 A.2d at 454-455](#). It is equally well established, nevertheless, that diversion of dedicated land from one public use to another may be approved in a proper case. For example, in [Shields v. Philadelphia, 405 Pa. 600, 176 A.2d 697 \(1962\)](#), the use, as a Little League baseball field, of a portion of park land dedicated to the City of Philadelphia as a park "on condition that no buildings shall be erected thereon other than those required for the comfort of the people, and also that the garden and trees shall be preserved as far as possible" was held not to **[\*\*\*17]** violate the language of the dedication. We said in *Shields* that parks were commonly recognized as places particularly well-suited to recreational and athletic endeavors of every sort and that, because much of this park would remain untouched, the proposed use was not inconsistent with the terms of the original grant. Likewise, in [Bernstein v. Pittsburgh, supra](#), use for an open-air auditorium of portions of land dedicated to the public as a park was held not to violate the dedicatory language which called for a "place of free, attractive and healthful resort, and open air recreation . . . and perpetually keeping and maintaining the same for such uses . . . and for no other purpose whatever." We concluded that the mental and cultural recreational activities planned for the auditorium (light opera productions) were consonant with the dedicatory proscription. See also [Bruker v. Carlisle Borough, supra](#); [Commonwealth v. Connellsville Borough, supra](#).

**[\*239]** An examination of the dedicatory language in the instant case produces no indication of an intention on the part of the draftsmen to preclude improvement of a street

which has been a public thoroughfare through **\*\*\*18** the Common from the beginning. The proposed plan will divert less than three per cent n11 of the Common from one public purpose to another public purpose, i. e., from use as part of the street-bordering tree lawns and sidewalks to use as part of a widened and improved street. Moreover, there is ample testimony to support the chancellor's conclusion that once the construction work is completed, the tree lawns and sidewalks will be reconstructed and the essential character of the Common will remain unaltered. As indicated earlier, the plan includes numerous proposals for preserving, and improving where possible, the present attractive features of the affected area. Thus, we find that the chancellor's conclusion that the proposed use does not violate the statutory dedications is sound and well-supported by the evidence.

----- Footnotes ----- -11

Penn DOT in its brief, calculates that the .59 acres of Common land needed equals 2.72% of the 21.70 acres of Common land presently devoted to park and recreational use.

----- End Footnotes-----

II.

Appellants next **\*\*\*19** argue that Penn DOT by its approval of the widening project abused its discretion and violated the obligations imposed on it by [Section 13](#) of the Act of May 6, 1970, P.L. 356, No. 120, as amended, [71 P.S. § 512](#) (Supp.1975-1976) [Act 120]. As to road construction projects which involve an historical site or a public park area like the Common, Act 120 requires Penn DOT, before giving final approval, to determine that no feasible and prudent alternative exists and that the project under consideration is planned in such a way as to minimize the harm to the affected land. n12 In furtherance of this **\*\*\*270** objective of environmental protection, Act 120 also **\*240** requires that various state agencies be consulted with regard to the potential for environmental harm engendered by the project n13 and that the cooperation of the political subdivision and interested private individuals and organizations be enlisted. n14 Where the project under consideration entails the acquisition of new or additional rights-of-way, the Act also mandates that a public hearing be held, at which the effects of the project in twenty-three enumerated areas are to be considered. n15 The **\*241** **\*\*\*20** hearing is to be conducted in compliance with established federal hearing procedures for federal-aid transportation programs. n16 As a final precondition to Penn DOT approval of any such plan, the Secretary of Penn DOT, based upon consideration of the evidence at the hearing, must issue findings either that the project is likely to cause no adverse environmental impact in the specified area, or that no reasonable and prudent alternative exists and all possible efforts are being made to reduce the adverse effect to a minimum. n17

----- Footnotes ----- -12

[Section 13\(a\), 71 P.S. § 512\(a\)\(15\)](#) (Supp.1975-1976).13

[Section 13\(a\), 71 P.S. § 512\(a\)\(15\)](#) (Supp.1975-1976).14

[Section 13\(a\), 71 P.S. § 512\(a\)\(7\)](#) (Supp.1975-1976).15

[Section 13\(b\), 71 P.S. § 512\(b\)](#) (Supp.1975-1976) provides:

"(b) Upon the submission of the preliminary plan or design to the Department of Transportation for any transportation route or program requiring the acquisition of new or additional right-of-way, the Department of Transportation except in cases involving

complaint proceedings under the jurisdiction of the Public Utility Commission shall have the power and its duty shall be to follow the hearing procedures now or hereafter required by the Federal Government for Federal-aid transportation programs pursuant to Titles 23 and 49 of the United States Code as amended and the regulations and procedures thereunder even though the transportation route or program does not contemplate the use of or actually employ Federal funds. At the hearings required by this subsection the Department of Transportation shall consider the following effects of the transportation route or program:

- (1) Residential and neighborhood character and location;
- (2) Conservation including air, erosion, sedimentation, wildlife and general ecology of the area;
- (3) Noise, and air and water pollution;
- (4) Multiple use of space;
- (5) Replacement housing;
- (6) Displacement of families and businesses;
- (7) Recreation and parks;
- (8) Aesthetics;
- (9) Public health and safety;
- (10) Fast, safe and efficient transportation;
- (11) Civil defense;
- (12) Economic activity;
- (13) Employment;
- (14) Fire protection;
- (15) Public utilities;
- (16) Religious institutions;
- (17) Conduct and financing of government including the effect on the local tax base and social service costs;
- (18) Natural and historic landmarks;
- (19) Property values;
- (20) Education, including the disruption of school district operations;
- (21) Engineering, right-of-way and construction costs of the project and related facilities;



(22) Maintenance and operating costs of the project and related facilities;

(23) Operation and use of existing transportation routes and programs during construction and after completion.

At the hearings required by this section, the public officials named in clause (15) of subsection (a) of this section shall make a report indicating the environmental effects of the proposed transportation route or program. The Department of Transportation shall not construct or reconstruct any portion of the transportation route or program unless the Secretary of Transportation makes a written finding published in the Pennsylvania Bulletin that:

(1) No adverse environmental effect is likely to result from such transportation route or program; or

(2) There exists no feasible and prudent alternative to such effect and all reasonable steps have been taken to minimize such effect. For the purpose of this subsection environmental effect shall refer to the effects enumerated in this subsection." [\*\*\*21]16

See note 15 *supra*.17

See note 15 *supra*.

- - - - - End Footnotes- - - - -

Appellants insist that Pen DOT's handling of this case fails in virtually all [\*\*271] these respects. Specifically, it is claimed that Penn DOT abused its discretion and violated its statutory duties when it: (1) failed to consider all reasonable and prudent alternatives; (2) approved [\*242] a plan in which the adverse effects will not be reduced to a minimum; (3) failed to comply with the applicable procedure; and (4) failed to obtain the final approval of the City of Wilkes-Barre. The chancellor determined that every requirement of Act 120 had been fully met by Penn DOT. From our own examination of the record, we agree.

The record demonstrates that Penn DOT considered each of the alternatives for traffic improvement which appellants suggest n18 during the initial study phase prior to the April 20, 1971 public hearing. After study, these alternate plans were specifically rejected as imprudent and unfeasible. We agree, therefore, that the claim that all alternatives were not given full consideration is without merit. Similarly, [\*\*\*22] appellants' charge that the present plan does not include efforts to minimize the adverse effects is simply not borne out by the record. The plan, briefly described earlier in this opinion, plainly demonstrates an effort to leave the affected area of the Common essentially unchanged in nature once the construction has been completed. The actual amount of land to be taken is small. The trees, sidewalks and the stone wall will be replaced; the historical significance of the markers which are to be moved will be in no way affected by their relocation. All in all, the record here indicates a commitment by the public officials involved to serve the spirit as well as the letter of Act 120. Whether they succeeded was, of course, a question in the first instance for the chancellor. He found that the proposed intrusion into the park would be relatively slight; would be at a point which is not critical to the use and enjoyment of the Common; and that, upon completion of the relandscaping and reconstruction work, the affected area will be essentially unaltered. His conclusion that reasonable [\*243] efforts have been made to hold the adverse effect to a minimum in accordance with Act [\*\*\*23] 120 was fully warranted.



These included: no action at all; the creation of a one-way couplet with River Street and a parallel street; and directing some traffic flow onto surrounding streets.

----- End Footnotes-----

[Section 13\(b\)](#) of Act 120 stipulates that "the hearing procedures" required by the federal government with respect to federal-aid transportation programs shall be followed by Penn DOT. [71 P.S. § 512\(b\)](#). Appellants assert that the present practice of the federal Department of Transportation, where a proposed highway infringes on parkland, is to require specific findings at the administrative level as to the impact of the project in each respect enumerated by a statute, such as Act 120, implementing a federal aid program. n19 Because no such specific findings of this nature were made by the Secretary of Penn DOT, it is argued that the entire proceedings are invalid. We cannot agree. Granted that the procedure at hearings under Act 120 must track the federal procedure, appellants have not satisfied us that findings **\*\*\*24** by the secretary are part of "hearing procedures". The evidence was extensive and detailed, and the secretary did indeed make findings. We hold that they were adequate in form and substance.

----- Footnotes -----19

Appellants, without citation or provision of a copy, refer to a United States Department of Transportation Order 5610.1.

----- End Footnotes-----

Finally with regard to Act 120, appellants claim that Penn DOT never obtained the final approval of the City of Wilkes-Barre for the project, allegedly a prerequisite to its legality, and, therefore improperly went forward with its own approval. The City Council of Wilkes-Barre gave conditional approval for the scheme on July 6, 1971, but took no further formal action. This non-action, in appellants' view, demonstrates that the City withheld its approval. But, as the chancellor noted, the city manager and the city engineer **\*\*272** both testified that the final plan did meet with the City's approval. Even if this were not sufficient, the Act does not require actual **\*244** approval of all **\*\*\*25** aspects of the plan by the political subdivision wherein the affected land is located; it requires instead only that the cooperation of that political entity be enlisted in the formulation and the development of the plan. [71 P.S. § 512\(a\)\(7\)](#). The chancellor's specific finding of fact that such cooperation was forthcoming was not excepted to by the appellants. In sum, then, the record supports the chancellor's conclusions that Penn DOT fully complied with the requirements of Act 120 and that the secretary did not abuse his discretion in striking the balance between the benefits and detriments of this project in favor of the project. n20

----- Footnotes -----20

Appellants also argue that Penn DOT failed to consult with the Pennsylvania Historical and Museum Commission as required by the Act of March 4, 1970, P.L. 117, No. 45, § 1, [71 P.S. § 716\(j\)](#) (Supp.1975-1976). As explained by the chancellor, this assertion is directly refuted by the testimony of one of appellant's own witnesses, Edward F. LaFond, Jr.

----- End Footnotes-----

III.

Appellants' **\*\*\*26** final argument is that the Commonwealth, through the action of Penn DOT in approving the River Street project, violated its duties as trustee under [Article I, § 27 of the Pennsylvania Constitution](#), and that the enterprise must therefore be enjoined as

unconstitutional. Article I, § 27 provides:

"The people have a right to clear 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."

Appellants assert, and the appellees agree, that this provision is "self-executing" and that appellants have standing as beneficiaries of the public trust thereby created [\*245] to bring suit to enjoin the Commonwealth from breach of its duties as trustee. The Commonwealth Court agreed that the provision is self-executing and applicable here, but ruled that the mandate of Article I, § 27 had not been violated in this case.

We see no need, in this case, to explore the difficult terrain of whether [\*\*\*27] 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 ground 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 enunciate these broad purposes and establish these relationships; the amendment does so by its own *ipse dixit*. There is also no doubt that the property here involved is public property, a "public Common", and that it is possessed of certain natural, scenic, historic and esthetic values. The deeds and the evidence [\*\*\*28] establish as much. The only question is whether a court can proceed, on this basis and without more, to adjudicate the charge that the proposed road widening project "will violate the constitutional rights" of the plaintiffs to the preservation of those values (Complaint, par. 48f., at 16a); or stated [\*273] another way, will violate the trust imposed on the Commonwealth to conserve those values (Complaint, par. 48g at 16a). On this record we see no impediment to asserting the constitutional claim. Cf. [Rhoades v. School \[\\*246\] District of Abington Township, 424 Pa. 202, 226 A.2d 53 \(1967\)](#). n21

- - - - - Footnotes - - - - -21

Appellees do not dispute the Commonwealth Court's conclusion that members of the Wilkes-Barre public who use the Common and whose rights under Article I, § 27 are allegedly adversely affected (appellants) have standing to proceed with their claim. In this case we have no occasion to disagree with that proposition. See generally [Price v. Philadelphia Parking Authority, 422 Pa. 317, 221 A.2d 138 \(1966\)](#); [Mayer v. Hemphill, 411 Pa. 1, 190 A.2d 444 \(1963\)](#); [Page v. King, 285 Pa. 153, 131 A. 707 \(1926\)](#). See also [Philadelphia Life Insurance Company v. Commonwealth, 410 Pa. 571, 190 A.2d 111 \(1963\)](#); [Pennsylvania Gas and Water Co. v. Kassab, 14 Pa.Cmwlt. 564, 322 A.2d 775 \(1974\)](#).

- - - - - End Footnotes- - - - -

[\*\*\*29] But merely to assert that one has a common right to a protected value under the trusteeship of the State, and that the value is about to be invaded, creates no automatic right to relief. The new amendment speaks in no such absolute terms. The Commonwealth

as trustee, bound to conserve and maintain public natural resources for the benefit of all the people, is also required to perform other duties, such as the maintenance of an adequate public highway system, also for the benefit of all the people. See Sections 11 and 13(a) of Act 120, [71 P.S. 511](#), [513\(a\)](#). It is manifest that a balancing must take place, and by Act 120, discussed supra, the legislature has made careful provision for just that. n22 Thus an area such as the River Common is to be avoided altogether for highway purposes if possible, but, if there is no feasible alternative, may be utilized in such a way as to minimize the environmental or ecological impact of the use. The elaborate safeguards provided by Act 120 (see [71 P.S. § 512](#)), if truly complied with by the governmental departments and agencies involved, vouchsafe that a breach of the trust established by Art. I, § 27 will [\*247] not occur. n23 Having [\*\*\*30] determined that Act 120 was complied with, we have no hesitation in deciding that the appellee Commonwealth of Pennsylvania has not failed in its duties as trustee under the constitutional article.

- - - - - Footnotes - - - - -22

Article I, § 27 was adopted by the voters on May 18, 1971. It was first passed on by the Legislature in 1969 and was amended and then approved in 1970. See Broughton, "The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of HB 958", 41 Pa.Bar Assoc.Quarterly 421 (1970). Act 120 was enacted on May 6, 1970.23

We note that the Commonwealth Court, in fashioning a threepart test to determine whether Article I, § 27 has or has not been observed, requires nothing more in this case than does normal appellate review of Penn DOT's actions under Act 120. The factors identified by the Commonwealth Court were the following:

"(1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?" [11 Pa.Cmwlt. at 29-30, 312 A.2d at 94.](#)

- - - - - End Footnotes- - - - -

[\*\*\*31] Decree affirmed. Each party to bear own costs.

**DISSENT BY: ROBERTS**

**DISSENT**

ROBERTS, Justice (dissenting).

I dissent. In my view, the proposed widening of River Street violates the statutory dedications of the land as a public common.

[\*\*274] In 1807 the Pennsylvania Legislature dedicated a portion of the land in question in the following terms:

"And be it further enacted . . . That all that certain tract of land fronting the town lots in the borough of Wilkes-Barre, on the bank of the Susquehanna . . . be, and the same hereby is granted and set apart *as a public common, and to remain as such forever.*"Act of April 9, 1807, Section III, 4 Sm.L. 411, Law Book Vol. XI at 47. (Emphasis added.)

**[\*248]** Another parcel for the Common was dedicated by the Legislature in 1846:

"That all that certain tract of land, fronting the town lots in the borough of Wilkes-Barre, on the bank of the Susquehanna . . . and the same hereby is granted and set apart *as a public common*, and to be under the control and jurisdiction of the town council of said borough." Act of March 28, 1946, P.L. 196, § 6. (Emphasis added.)

The dedications expressly grant the land **[\*\*\*32]** for use "as a public common." The majority finds that the use of part of that land as a road does not violate the dedications. I cannot agree.

The majority concedes that our case law is that "land so dedicated . . . may be diverted by the responsible public officials neither to private uses . . . nor to public uses not within those designated or specified in the dedicatory language." Yet that is precisely what is being done here. Although using the land as widened street is, no doubt, a public use as the majority finds, it is not use of the land as a "common" as I understand that term. The majority incorrectly equates "public use" with "public common." Nor can I conclude, as the majority seems to, that such a taking of more than one half acre of the Common land for use as a street is de minimis.

I am also not persuaded that Penn DOT sustained its burden under [Section 13](#) of the Act of May 6, 1970, P.L. 356, No. 120, as amended, [71 P.S. § 512](#) (Supp.1976), of showing that there is no feasible alternative to use of this historic and recreational land.

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136 Pa. Commw. 119, \*; 582 A.2d 427, \*\*;  
1990 Pa. Commw. LEXIS 601, \*\*\*

James C. O'CONNOR, et al., Petitioners, v. PENNSYLVANIA PUBLIC UTILITY COMMISSION,  
Respondent

No. 1977 C.D. 1989

Commonwealth Court of Pennsylvania

136 Pa. Commw. 119; 582 A.2d 427; 1990 Pa. Commw. LEXIS 601

September 13, 1990, Argued

November 9, 1990, Decided

**PRIOR HISTORY:**

[\*\*\*1] Appeal from No. A-00110550F022; Pennsylvania Public Utility Commission.

**COUNSEL:** James C. O'Connor, Farage & McBride, Philadelphia, for petitioners.

Patricia Krise Burket, Asst. Counsel, with her, Frank B. Wilmarth, Deputy Chief Counsel,  
and John F. Povilaitis, Chief Counsel, Harrisburg, for respondent.

Donald Blanken, Philadelphia, for intervenor, Philadelphia Elec. Co.

**JUDGES:** Smith and Kelley, JJ., and Barry, Senior Judge.

**OPINION BY:** BARRY

**OPINION**

[\*122] [\*\*428] OPINION

James C. O'Connor and other residents living near the proposed site of an electrical utility substation and control building (protestants) appeal from a decision of the Pennsylvania Public Utility Commission (PUC) that approved an application of the Philadelphia Electric Company (PECO) to [\*\*429] obtain exemption from local zoning laws for the proposed facility. n1

----- Footnotes -----1

The original protest filed with the PUC names as protestants Dr. and Mrs. Walter Malone and Mr. and Mrs. James C. O'Connor. (R.R. 7a.)

----- End Footnotes-----

The questions presented are (1) whether the PUC was bound to defer to an opinion

expressed [\*\*\*2] by the Pennsylvania Historical and Museum Commission (Historical Commission) that the area in question is of historical significance and that the proposed substation would adversely affect it, and (2) whether the findings and conclusions of the administrative law judge (ALJ) whose initial decision the PUC adopted relating to the reasonable necessity for the selected site and the adequacy of efforts to reduce the environmental incursion of the facility are supported by substantial evidence in the record.

PECO filed an application with the PUC to obtain an exemption from local zoning rules pursuant to Section 619 of the Pennsylvania Municipalities Planning Code (MPC) n2 in order to build a substation n3 on a 3.831-acre site PECO owns in a section of East Goshen Township (Township), Chester County, known as Rocky Hill. Nearby residents filed protests with the PUC, averring that the substation [\*123] would have an adverse visual impact on the area, which they said was of historical value. The Township also filed a protest. The ALJ conducted a public input hearing and five days of evidentiary hearings concerning the application. He denied the request of the Historical Commission [\*\*\*3] to intervene. The PUC reversed his order and allowed intervention, and the Historical Commission presented evidence. That evidence included the prepared testimony of Kurt W. Carr, Chief of the Division of Archaeology and Protection of the Historical Commission, and certain exhibits, including a letter from the Director of the Bureau for Historic Preservation of the Historical Commission to the Secretary of the PUC, stating that the opinion of that office was that "the Rocky Hill Historic District is historically significant and eligible for listing in the National Register of Historic Places as an example of the establishment and modest growth of an important type of community in Chester County, the crossroads hamlet." (Historic Commission Exhibit A-5; R.R. 735a.) The Historical Commission's recommendations for the proposed substation, in order, were (1) build it elsewhere, (2) build it underground or (3) move it to the rear of the property.

----- Footnotes -----2

Act of July 31, 1968, P.L. 805, *as amended*, [53 P.S. § 10619](#). That section provides in part:

This article shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon petition of the corporation, the Pennsylvania Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public. [\*\*\*4]3

PECO proposes to build a 69KV-34KV distribution substation. The high voltage electrical equipment is to be located outdoors, and the control equipment is to be housed within a control building.

----- End Footnotes-----

PECO presented the expert testimony of two qualified electrical engineers who testified about the need for a substation in the general area because of increased demand. They also testified that the site selected was ideal because the location afforded ease of ingress and egress for transmission lines, the size was sufficient, the cost to develop would be low because the topography was good, the site was acquired amicably for reasonable cost and had enough area for future expansion, and the corner location allowed direct access to streets for distribution lines to run north and south or east and west. Other PECO witnesses testified concerning the site selection from a real estate perspective, comparing the selected location to fifteen alternative sites that had been considered by PECO and rejected.

PECO performed test archaeological digs at the site, at the request of the Historical Commission. The [\*\*\*5] Historical Commission [\*124] agreed with PECO's determination that no significant archaeological resources were present.

At the public input hearing one non-party witness presented a list of thirteen alternative sites. The Township also presented evidence concerning alternative sites, and a [\*\*430] witness for the protestants presented another alternative site (Coco site). PECO's witnesses testified in rebuttal to the alternatives presented at the public input hearing and by the Township. PECO did not expressly offer rebuttal with regard to the Coco site. Its cross-examination established, however, that the witness who proposed it had never designed an electrical substation or selected a site for one and had no experience designing transmission lines. It was also established that he did not have an electrical engineering degree that he claimed to have.

The ALJ filed an initial decision approving the application subject to the conditions that PECO landscape the site in accordance with landscaping plans submitted by the Township and that noise levels at the property line not exceed levels set forth in the Township ordinance. The protestants filed exceptions to the ALJ's decision with [\*\*\*6] the PUC, and PECO filed reply exceptions. The PUC issued an opinion and order denying the exceptions of the protestants, adopting the decision of the ALJ and approving the application subject to conditions the ALJ imposed. The protestants petitioned this Court for review of the PUC's action; the Township and the Historical Commission did not appeal. n4

- - - - - Footnotes - - - - -4

Our scope of review of an order of the PUC is limited to a determination of whether the PUC violated constitutional rights or committed an error of law or whether its necessary findings were not supported by substantial evidence in the record. [2 Pa. C.S. § 704](#); [Bell Telephone Company of Pennsylvania v. Pennsylvania Public Utility Commission, 83 Pa. Commonwealth Ct. 331, 478 A.2d 921 \(1984\)](#).

- - - - - End Footnotes- - - - -

The protestants first contend that the PUC must defer to the determinations of the Historical Commission that the Rocky Hill area is of historic significance, that the substation will have an adverse effect on the historical nature of the area, [\*\*\*7] and that the substation should be [\*125] located at an alternative site. [Section 301\(3\)](#) of the History Code (Code), [37 Pa. C.S. § 301\(3\)](#), provides that the Historical Commission shall have the power and duty, among other things, to "[i]nitiate, encourage, support and coordinate and carry out historic preservation efforts in this Commonwealth." [Section 508\(4\)](#) of the Code, [37 Pa. C.S. § 508\(4\)](#), provides that Commonwealth agencies shall "[i]nstitute procedures and policies to assure that their plans, programs, codes, regulations and activities contribute to the preservation and enhancement of all historic resources in this Commonwealth." The protestants contend that the above sections of the Code empower the Historical Commission to render decisions regarding the effect of a proposed project on the historic resources where a Commonwealth assisted, permitted or contracted project is involved.

Arguing by analogy to this Court's holding in [Del-AWARE, Unlimited, Inc. v. Pennsylvania Public Utility Commission, 99 Pa. Commonwealth Ct. 634, 513 A.2d 593 \(1986\)](#), protestants contend that the PUC is bound to respect such determinations of the Historical Commission. [\*\*\*8] In that case the PUC approved the location of a pump house that was part of a project to divert water from the Delaware River to a creek, where it could flow to provide supplemental cooling for the Limerick nuclear generating station. The protestant



citizens' group argued in part that the PUC did not adequately consider the environmental impact of the pump house under [Pa. Const. art. I, § 27](#). n5 This Court held that Section 619 of the MPC empowered the PUC to determine only whether the *site* of the pump house was appropriate and in the public interest, not to reevaluate various aspects of the environmental impact of the facility that had been considered by the Pennsylvania Department of Environmental Resources (DER) when it granted construction **[\*126]** **[\*\*431]** permits for the project. We held that the PUC was obliged to defer to DER's determinations within its jurisdiction regarding environmental impact. The protestants here contend that the Historical Commission has made a similar determination within its jurisdiction, to which the PUC must defer.

----- Footnotes ----- -5

That section of the Pennsylvania Constitution provides:

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.

----- End Footnotes-----

**[\*\*\*9]** The protestants contend further that although the Pennsylvania Supreme Court held in [Commonwealth v. National Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 311 A.2d 588 \(1973\)](#), that art. I, § 27 is not self-executing, but requires legislation to define the values sought to be protected and to establish procedures by which the use of private property can be regulated to protect those values, the History Code, enacted in 1988, n6 is the type of legislation contemplated in the Supreme Court's decision.

----- Footnotes ----- -6

Act of May 26, 1988, P.L. 414.

----- End Footnotes-----

The PUC acknowledges that this Court's decision in [Payne v. Kassab, 11 Pa. Commonwealth Ct. 14, 29-30, 312 A.2d 86, 94 \(1973\)](#), *aff'd*, [468 Pa. 226, 361 A.2d 263 \(1976\)](#), established a three-pronged test for review of governmental actions challenged under art. I, § 27: (1) was there compliance with all applicable statutes and regulations relating to protection of natural resources; (2) does the **[\*\*\*10]** record show a reasonable effort to reduce environmental incursion to a minimum; and (3) whether the environmental harm would so clearly outweigh the benefits to be derived that going ahead with the project would be an abuse of discretion. If the History Code required the PUC to defer to the Historical Commission, then the PUC's order in this case would not meet the first prong of the *Payne* test.

The PUC asserts, however, that nothing in the Code expressly authorizes the Historical Commission to conduct legal proceedings to determine the environmental impact of development upon a historical resource. The PUC notes that Section 502 of the Code provides in part that the Historical Commission shall have the power and duty to:

**[\*127]** (6) Provide information and advice on historic resources and appropriate preservation procedures to public officials, private individuals and organizations.



(7) Advise public officials regarding the planning and implementation of undertakings affecting historical resources.

. . . .

(10) Coordinate and comment upon activities of public officials affecting historic resources and preservation activities. By the PUC's interpretation, these provisions [\*\*\*11] establish only an advisory role for the Historical Commission, not the power to make determinations binding upon other agencies. The PUC asserts that the ALJ did consider the advice of the Historical Commission, and followed that advice to the extent of requiring PECO to incorporate the landscaping proposals offered by the Township into the final plan for the substation.

Intervenor PECO argues that the jurisdiction and authority of the Historical Commission is vastly different from that of the DER, which was at issue in *Del-AWARE*. DER is statutorily authorized to make findings and determinations regarding environmental impact and to issue permits regarding various matters, including permits for different aspects of the construction at issue in that case, n7 but the Historical Commission is not so authorized. PECO also contends that the Historical Commission's actions in this case do not constitute a "determination", noting that the Historical Commission's witness conceded that no representative of that commission had visited and examined the area.

- - - - - Footnotes - - - - - 7

See [Del-AWARE, Unlimited, Inc. v. Department of Environmental Resources, 96 Pa. Commonwealth Ct. 361, 365 n. 5, 370 n. 14, 508 A.2d 348, 352 n. 5, 354 n. 14, petition for allowance of appeal denied, 514 Pa. 644, 523 A.2d 1132 \(1986\)](#), (listing construction permits granted by DER and the statutory basis for such permits, in this Court's affirmance of orders of the Environmental Hearing Board upholding DER's actions regarding the same water-diversion project against challenges by citizens' groups).

- - - - - End Footnotes - - - - -

[\*\*\*12] The only portion of the History Code authorizing the Historical Commission to issue permits is found in [Section \[\\*128\] 506\(d\)](#) of [\*\*432] the Code, [37 Pa. C.S. § 506\(d\)](#), relating to permits for archaeological field investigations on Commonwealth land. [Section 507\(a\)](#) of the Code, [37 Pa. C.S. § 507\(a\)](#), requires Commonwealth agencies and political subdivisions to notify potential permittees, contractors or others whose activities may affect archaeological sites that the costs of surveys or field investigations should be included in their bids or permit applications. The Code requires agencies and subdivisions to notify the Historical Commission before undertaking any Commonwealth assisted, permitted or contracted projects that may affect archaeological sites or when they learn of any undertaking in connection with such a project that affects or may affect such a site. As noted above, PECO conducted archaeological testing to the satisfaction of the Historical Commission in this case. In addition, [Section 512](#) of the Code, [37 Pa. C.S. § 512](#), relating to enforcement of historic preservation laws and policies, provides: "The Attorney General, the [Historical] commission, any political subdivision, [\*\*\*13] person or other legal entity may maintain an action in an administrative tribunal or court for the protection or preservation of any historic resource in this Commonwealth."

In our view, the provisions of the History Code noted above support the PUC's position that the role of the Historical Commission is advisory and that it lacks the authority to make determinations binding upon other agencies, such as the PUC. The Code does not empower or require the Historical Commission to grant permits for construction affecting historical

resources, and it does not establish procedures by which the Historical Commission can adjudicate disputes. [Section 512](#), by authorizing the Historical Commission, among others, to proceed before administrative tribunals or courts to protect historic resources, implies that the Commission lacks the authority to adjudicate such matters itself. The PUC did not err by concluding that the Historical Commission's opinions in this matter should be considered, but that those opinions were **[\*129]** not binding upon the PUC in its determination of PECO's application for exemption from local zoning laws.

The protestants next note that the ALJ, in discussing the alternative **[\*\*\*14]** site advanced by the protestants, the Coco site, stated that there was a substantial question regarding PECO's ability to acquire it, that it appeared to be too small and that use of it would result in a cost penalty. The protestants assert that no testimony in the record supports these statements. The protestants also note that, although PECO requested permission to rebut their evidence concerning the Coco site, PECO did not present any rebuttal testimony. A fact finder may draw a negative inference from a party's failure to call an available witness with relevant, noncumulative testimony that ordinarily would be expected to favor the party. [Murphy v. Department of Public Welfare, 85 Pa. Commonwealth Ct. 23, 31-32, 480 A.2d 382, 387 \(1984\)](#). Protestants assert that application of that principle to PECO's failure to recall its engineering witnesses to rebut their evidence concerning the Coco site should require such a negative inference and the consequent adoption of their witness' testimony regarding the feasibility of the alternative.

The PUC responds that the statements of the ALJ (which were not findings of fact) were supported in the record, **[\*\*\*15]** noting that the protestants' Exhibit No. 8, a communication from the realtor involved to Mr. O'Connor, indicated that the price was \$ 350,000 and that the net usable land of the lot was approximately 2.62 acres. PECO's evidence was that the ultimate configuration of the proposed substation would require three acres. The PUC asserts that the cost of purchasing the property speaks for itself. PECO refers to questions, noted above, concerning the qualifications of that witness that it raised on cross examination and later. It notes also that the Township solicitor later corrected a statement by the protestant's witness that the Coco site would not affect residential areas, noting that the map of the site showed that it was contiguous to a residential property.

**[\*130]** The PUC also contends that no legal authority required PECO to investigate the site suggested by the protestants. The requirement of Section 619 of the MPC is **[\*\*433]** that the PUC determine that "the proposed situation of the building is reasonably necessary for the convenience or welfare of the public." Under the PUC's precedent on this subject, a utility seeking Section 619 zoning exemption must demonstrate "reasonable **[\*\*\*16]** necessity" for a particular location, not "absolute need":

The Company must show that it has made a reasonable decision, not the best possible decision. Evidence of an alternative may be the basis for questioning the reasonableness of the Company's decision but mere existence of an alternative site does not invalidate the company's judgment.

[Re Philadelphia Suburban Water Co., 54 Pa. PUC 127, 132 \(1980\)](#). The PUC and PECO both point to the extensive evidence presented by PECO's witnesses as to why the site chosen was desirable and reasonable. Concerning negative inferences, the PUC notes that the principle cited by protestants is that a fact finder *may* draw such an inference, not that he or she must.

The PUC is correct that Section 619 of the MPC does not require a utility to prove that the site it has selected is absolutely necessary or that it is the best possible site. If the PUC's finding that the site chosen is reasonably necessary is supported by substantial evidence, this Court will not disturb that finding. Substantial evidence is that quantum of evidence that a reasonable mind might accept as sufficient to support a conclusion. [Norfolk and Western Railway Co. v. Pennsylvania Public Utility Commission, 489 Pa. 109, 128, 413 A.2d 1037, 1047 \(1980\).](#) [\*\*\*17] PECO's extensive evidence concerning its reasons for selecting the site at issue here and its consideration of various possible alternatives, once credited by the fact finder, constituted substantial evidence. Further, as the PUC correctly notes, there is absolutely no requirement that a fact finder draw a negative inference from a failure to call or recall a witness. [\*131] *Murphy*, cited by the protestants for that proposition, also states: "We stress this rule only states that an inference may be drawn from a party's failure to produce a particular witness. The rule does not call for the creation of a presumption which shifts a burden of proof." [85 Pa. Commonwealth Ct. at 31 n. 7, 480 A.2d at 387 n. 7.](#)

Finally, the protestants assert that the screening and landscaping for the substation pursuant to the proposal made by the Township and incorporated into the final plan by the PUC's order is inadequate. They list the height of the structures and of the trees and berm proposed to demonstrate that the trees will not completely screen the structures. The PUC denied protestants' exceptions to the ALJ's findings that PECO had in the past constructed [\*\*\*18] similar projects in conformity with the surroundings, and it would do so in this case. In its brief here, the PUC asserts that the protestants are asking this Court to engage in de novo fact-finding, beyond our scope of review. PECO asserts that the landscaping provisions incorporated in the plan are reasonable and adequate to reduce the environmental incursion, under the second prong of the *Payne* test.

The protestants' position in effect asserts that *Payne* requires that an intrusive facility be completely screened from view by trees or shrubbery. We do not interpret *Payne* to establish such a rigid principle, and we decline to disturb the PUC's conclusion, on the basis of the evidence in the record, that the efforts to reduce the environmental intrusion to a minimum in this case are adequate.

For the foregoing reasons, we affirm the order of the PUC.

ORDER

NOW, November 9, 1990, the order of the Pennsylvania Public Utility Commission at Docket No. A-00110550F022, entered September 6, 1989, is affirmed.

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*66 Pa.C.S. § 1501*

PENNSYLVANIA STATUTES, ANNOTATED BY LEXISNEXIS(R)

\* THIS DOCUMENT IS CURRENT THROUGH ACT 60 OF THE 2010 LEGISLATIVE SESSION \*  
\*\*\* EXCEPT TITLES 60 TO 61 WHICH ARE CURRENT THROUGH ACT 71 \*\*\*

\*\*\* NOVEMBER 10, 2010 ANNOTATION SERVICE \*\*\*

PENNSYLVANIA CONSOLIDATED STATUTES  
TITLE 66. PUBLIC UTILITIES  
PART I. PUBLIC UTILITY CODE  
SUBPART C. REGULATION OF PUBLIC UTILITIES GENERALLY  
CHAPTER 15. SERVICE AND FACILITIES  
SUBCHAPTER A. GENERAL PROVISIONS

66 Pa.C.S. § 1501 (2010)

§ 1501. Character of service and facilities

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility. The commission shall have sole and exclusive jurisdiction to promulgate rules and regulations for the allocation of natural or artificial gas supply by a public utility.

*66 Pa.C.S. § 1103*

PENNSYLVANIA STATUTES, ANNOTATED BY LEXISNEXIS(R)

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PENNSYLVANIA CONSOLIDATED STATUTES

TITLE 66. PUBLIC UTILITIES  
PART I. PUBLIC UTILITY CODE  
SUBPART C. REGULATION OF PUBLIC UTILITIES GENERALLY  
CHAPTER 11. CERTIFICATES OF PUBLIC CONVENIENCE  
SUBCHAPTER A. GENERAL PROVISIONS

**66 Pa.C.S. § 1103** (2010)

§ 1103. Procedure to obtain certificates of public convenience

(a) GENERAL RULE.-- Every application for a certificate of public convenience shall be made to the commission in writing, be verified by oath or affirmation, and be in such form, and contain such information, as the commission may require by its regulations. A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable. In every case, the commission shall make a finding or determination in writing, stating whether or not its approval is granted. Any holder of a certificate of public convenience, exercising the authority conferred by such certificate, shall be deemed to have waived any and all objections to the terms and conditions of such certificate.

(b) INVESTIGATIONS AND HEARINGS.-- For the purpose of enabling the commission to make such finding or determination, it shall hold such hearings, which shall be public, and, before or after hearing, it may make such inquiries, physical examinations, valuations, and investigations, and may require such plans, specifications, and estimates of cost, as it may deem necessary or proper in enabling it to reach a finding or determination.

(c) Deleted by 2002, Dec. 30, P.L. 2001, No. 230, § 8(2)(iv), effective Feb. 28, 2003; 2004, July 16, P.L. 758, No. 94, § 19, effective March 12, 2005.

(d) TEMPORARY AUTHORITY. --Except during the threat or existence of a labor dispute, the commission under such regulations as it shall prescribe may, without hearing, in proper cases, consider and approve applications for certificates of public convenience, and in emergencies grant temporary certificates under this chapter, pending action on permanent certificates; but no applications shall be denied without right of hearing thereon being tendered to the applicant.

(e) ARMORED VEHICLES. --A certificate of public convenience to provide the transportation of property of unusual value, including money and securities, in armored vehicles shall be granted by order of the commission upon application. Such carriers must conform to the rules and regulations of the commission.