Chapter 3: Planning I: Elements of the County or Multi-Municipal Plan—Section 301

Appendix 3A-1: Worksheets for Planning Elements
Appendix 3A-2: Statutory Limits on Planning and Zoning for Resource-Based Land Uses: Preemption and Exceedance

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Regulation of Resource-Based Land Uses

The Growing Smarter amendments to the Municipalities Planning Code (particularly in Act 68) authorize planning and zoning for protection of natural and historic resources, but also impose specific limitations on planning and zoning for these purposes. These are contained in the amendments to sections 301 and 603 of Pennsylvania’s Municipalities Planning Code (MPC), (quoted in the sidebar on page 3A-14).

Planning and zoning generally involve deciding where to locate particular uses in each municipality and how to regulate them for the general health, safety, and welfare of the community. Zoning, the major regulatory tool, is an extensive power (see pages 4-9 to 4-13) with the ability to determine uses of land and water, lot size, density, height, setbacks, and open space requirements in accordance with reasonable standards to accomplish the broad purposes specified in the MPC (particularly in Sections 310, 603, and 604). The regulatory powers of local government are primarily used to regulate residential, commercial, industrial, and institutional uses. However, they also may apply to agriculture, forestry, and other resource-based uses to the extent not preempted by state law. In fact, the power to regulate these uses is more strongly stated in the 2000 amendments, but it is also more specifically limited. The power to regulate the land use aspects of these industries at the local level can, among other things, help to minimize conflicts among land uses.

Pennsylvania’s General Assembly has recognized that planning and zoning are principally local functions, and the MPC gives local governmental units the framework for determining local solutions, depending on local uses, resources, conditions, and objectives. Therefore in a majority of instances, in response to the conditions obtaining in its own community, each municipality, county, or group of municipalities, under now permitted multi-municipal planning and zoning, develops its own, unique comprehensive plan and implementing zoning ordinances.

Land uses that use or develop Pennsylvania’s natural resources of soil, minerals, and water, have economic, public health, or environmental concerns that extend beyond one municipality, township, or
Act 68's List of Statutes Limiting Planning and Zoning

The Growing Smarter amendments to the MPC specifically call the attention of local officials to existing and new limits on local legislation by saying with respect to planning in Section 301(a)(6):

(a) The municipal, multimunicipal or county comprehensive plan . . . shall include, but need not be limited to, the following related basic elements:

(6) A plan for the protection of natural and historic resources to the extent not preempted by Federal or State law. This clause includes, but is not limited to, wetlands and aquifer recharge zones, woodlands, steep slopes, prime agricultural land, flood plains, unique natural areas and historic sites. The plan shall be consistent with and may not exceed those requirements imposed under the following:


With respect to zoning, Section 603(b) provides:

Zoning ordinances, except to the extent that those regulations of mineral extraction by local ordinances and enactments have heretofore been superseded and preempted by the Act of May 31, 1945 (P.L. 1198, No. 418), known as the “Surface Mining Conservation and Reclamation Act,” the Act of December 19, 1984 (P.L. 1093, No. 219), known as the “Noncoal Surface Mining Conservation and Reclamation Act,” and the Act of December 19, 1984 (P.L. 1140, No. 223), known as the “Oil and Gas Act,” and to the extent that the subsidence impacts of coal extraction are regulated by the Act of April 27, 1966 (1st Sp.Sess., P.L. 31, No. 1), known as “The Bituminous Mine Subsidence and Land Conservation Act,” and that regulation of activities related to commercial agricultural production would exceed the requirements imposed under the Act of May 20, 1993 (P.L. 12, No. 6), known as the “Nutrient Management Act,” regardless of whether any agricultural operation within the area to be affected by the ordinance would be a concentrated animal operation as defined by the “Nutrient Management Act,” the Act of June 30, 1981 (P.L. 128, No. 43), known as the “Agricultural Area Security Law,” or the Act of June 10, 1982 (P.L. 454, No. 133), entitled “An Act Protecting Agricultural Operations From Nuisance Suits And Ordinances Under Certain Circumstances,” or that regulation of other activities are preempted by other Federal or State laws may permit, prohibit, restrict and determine . . . [emphasis added].
county. These resource-based land uses, which usually involve extensive land areas, include agriculture, coal mining, forestry, oil and gas, and other mineral extraction operations. These uses, as well as residential, commercial, and industrial uses, affect the quantity and quality of Pennsylvania’s waterways and watersheds. The Pennsylvania General Assembly has recognized the special needs and impacts of resource-based land uses, and in most cases has established uniform, statewide regulation and has sometimes created special protections that shield these uses from a multiplicity of different local planning or zoning regulation.

Preemption and Supersession. In a majority of situations, even for resource-based uses, regulation and enforcement occur at both the state and local level. For example, the Pennsylvania Sewage Facilities Act incorporates municipal sewage treatment legislation into the overall scheme of statewide regulation. Thus, the general rule is that as long as local legislation does not conflict with state legislation, both may regulate the same activity: “[a]lthough local ordinances are superseded to the extent that they contradict or are inconsistent with a statute . . . municipalities may promulgate supplemental or additional regulations which are reasonable and do not offend the spirit of state regulatory provisions.”

In a minority of instances, however, state law will either preempt (that is, the act in question explicitly, or implicitly, as determined by the courts, prohibits local regulation that conflicts with the state law) or supersede (by displacing conflicting local regulation) local zoning and other land use regulation.

Faced with the possibility of state law preempting or superseding local regulation, local officials must determine the scope of applicable prohibitions. Pennsylvania case law holds that only “local regulatory powers actually and materially conflicting” with state legislation are prohibited. In order for there to be a conflict, the local regulation must address the “same activity,” the “same features” or the “same subject” of the state legislation. For example, in a case involving the provisions of the Noncoal Surface Mining Conservation and Reclamation Act, the Commonwealth Court identified the area preempted by examining the definition of the subject of the legislation, “surface mining,” which included “all surface activity connected with surface . . . mining.” The court determined that the defined subject matter included, and so preempted, local regulation requiring buffers or berms (which come within the mean-
ing of “all surface activity”), but did not preempt traditional land use regulations such as setbacks and use by permitted special exception. In addition, for ordinances already on the books, local officials must determine the effective date of preemption and supersession for each potentially conflicting statute.

Zoning and Mineral Extraction

The Surface Mining Conservation and Reclamation Act8 (the Surface Mining Act) governs open pit and strip mining of bituminous and anthracite coal and other metallic and nonmetallic minerals. Section 17.1 of the Surface Mining Act provides that the Act both supersedes and preempts local regulation of surface mining. Ordinances adopted pursuant to the MPC prior the effective date of January 1, 1972, are not superseded;9 zoning ordinances in existence prior to the Surface Mining Act effective date of January 1, 1972, are not preempted.10 Zoning ordinances adopted after the effective date are not preempted unless they regulate mining operations or mining activities, as defined in the Act. (Definitions of surface mining are quoted on page 3A-31.) As long as the ordinance regulates land use as a legitimate exercise of the municipality’s powers under the MPC, it is not preempted. For example, setback requirements and the designation of uses permitted by special exception are traditional land use regulations and are not preempted by the Surface Mining Act.11

The Noncoal Surface Mining Conservation and Reclamation Act12 (the Noncoal Act) governs “all surface mining operations where the extraction of coal is incidental to the extraction of minerals and where the coal extracted does not exceed 16 2/3% of the tonnage of materials removed.”13 Section 16 of Noncoal Act contains a supersession clause and a preemption clause that is similar to section 17.1 of the Surface Mining Act. Ordinances adopted pursuant to the MPC prior the effective date of section 16 of Noncoal Act, February 17, 1985,14 are not superseded.15 Zoning ordinances in existence prior to February 17, 1985, are not preempted.16 Zoning ordinances adopted after the effective date of the Noncoal Act are not preempted unless they regulate the operations or activities regulated by the Noncoal Act. As with the Surface Mining Act, as long as the ordinance regulates land use as a legitimate exercise of the municipality’s powers under the MPC, it is not preempted.17

The Oil and Gas Act18 regulates drilling for oil and gas, well operation and capping, and proper containment methods for oil tanks. Section 602 of the Oil and Gas Act contains a supersession clause and a preemption clause. Ordinances adopted pursuant to the MPC prior the effective date of the Oil and Gas Act, April 18, 1985,19 are not superseded by it. Zoning ordinances that constitute reasonable attempts by a municipality, pursuant to its police power, to safeguard the health, safety, and general welfare of its
citizens and are permitted by the MPC are not preempted by the Oil and Gas Act. In the case of *Nalbone v. Borough of Youngsville*, the Commonwealth Court examined local ordinances that required a conditional use permit for the “drilling, fracturing, shooting and other treatment” of oil or gas wells within an oil production district designated on the borough’s official zoning map. The Nalbones, who were prevented by the ordinances from drilling, claimed the ordinances were preempted by the Oil and Gas Act because they were “not, in substance, zoning ordinances, but are rather an attempt by the Borough to regulate an area preempted by the comprehensive provisions of the Oil and Gas Act.”

The court stated that section 602 of the Oil and Gas Act, which excludes from supersession “ordinances adopted pursuant to . . . the Pennsylvania Municipalities Planning Code,” was “a strong articulation of legislative intent to preserve local regulation of oil and gas well operations upon compliance with the provisions of the Pennsylvania Municipalities Planning Code.” Based upon consideration of the importance of the MPC as “the Legislature’s mandate for the unified regulation of land use and development,” which permitted the enactment of ordinances that “prohibit, regulate, restrict and determine uses of land and bodies of water, areas of land to be occupied by uses and structures, and population density, and may provide for the protection and preservation of natural resources and agricultural land” and the stated safety purposes of the ordinances that were enacted “with the utmost regard for protection of the existing . . . public water supply wells and the fresh ground water which supplies those wells,” the court determined:

This statement [of purposes] indicates that Ordinance No. 456 was enacted to regulate land use, which, as we have previously noted, is one of the primary purposes of zoning regulations. Moreover, conditional use provisions as detailed in the ordinance are traditional zoning devices. Ordinance No. 457 amends a prior zoning regulation addressing the activities of oil production and operation within the Borough. Both ordinances constitute reasonable attempts by the Borough, pursuant to its police power, to safeguard the health, safety and general welfare of its citizens and are clearly permitted by the MPC. As such, we conclude that both ordinances as enacted are prima facie valid.

**Subsurface Mining.** After providing for the three mineral extraction statutes discussed above, Act 68 further limits zoning under 53 Pa.C.S. § 10603(b) “to the extent that those regulations of mineral extraction by local ordinances and enactments have heretofore been superseded and preempted by . . . and to the extent that the subsidence impacts of coal extraction are regulated by” [emphasis added]:
The Bituminous Mine Subsidence and Land Conservation Act (the Bituminous Mine Act) applies to mining of bituminous coal by methods other than open pit or strip mining. The purpose of Bituminous Mine Act is to provide “for the conservation of surface land areas which may be affected in the underground mining of bituminous coal, to protect the public, to enhance the value of such lands for taxation, and to aid in the preservation of surface water drainage and public and private water supplies.” The Bituminous Mine Act also provides a process for compensating landowners whose surface structures have been damaged by subsidence caused by underground bituminous coal mining, regardless of whether the owner of the property owns the support estate. The Bituminous Mine Act does not contain a specific preemption or supersession clause, nor is there any case law involving the Bituminous Mine Act on the question of preemption of local land use regulation. The Bituminous Mine Act provides that “[a]ll bituminous coal mines or mining operations coming within the provisions of this act shall be under the exclusive jurisdiction of the Department of Environmental Resources [now the Department of Environmental Protection (DEP)] and shall be conducted in accordance with . . . the Bituminous Coal Mine Act . . . .” In addition, the Bituminous Mine Act contemplates local involvement in enforcement of its provisions by providing that:

[t]he mayors of cities, boroughs and incorporated towns, the boards of township commissioners or supervisors of townships of the second class, and the county commissioners of any county in which the mining of bituminous coal is conducted and such engineers and other agents as they may employ or appoint, shall, at all reasonable times, be given access to any portion of any bituminous coal mines or mining operations which it may be necessary to inspect for the purpose of determining whether the provisions of this act are being complied with. . . . 52 P.S. § 1406.11.

Because the limitations of Act 68 prohibits regulation of the subsidence impacts of coal extraction to the extent those subsidence impacts are regulated by the Bituminous Mine Act, it appears that municipalities may not enact procedures or programs for dealing with the subsidence impacts or ordinances that limit mining in order to prevent subsidence impacts. It may be appropriate to explore what the phrase in the zoning article “to the extent that the subsidence impacts of coal mining are regulated by” (the Bituminous Mine Act) means and to examine the extent to which DEP actually does regulate subsidence impacts and impacts on water resources.
Zoning and Commercial Agriculture

Act 68 limits zoning under 53 Pa.C.S. § 10603(b) “to the extent . . . that regulation of activities related to commercial agricultural production would exceed the requirements imposed under the . . . Nutrient Management Act regardless of whether any agricultural operation would be a concentrated animal operation as defined by [the Nutrient Management Act]. . . .” [emphasis added]:

The Nutrient Management Act was enacted “[t]o establish criteria, nutrient management planning requirements and an implementation schedule for the application of nutrient management measures on certain agricultural operations which generate or utilize animal manure.” Although submission of voluntary plans is encouraged, only the operators of “any concentrated animal operation” (a CAO) are required to develop and implement nutrient management plans under the Nutrient Management Act. The Nutrient Management Act prohibits conflicting local regulation and, at the same time, permits consistent local regulation that is “no more stringent” than the requirements of the Act:

This act and its provisions are of Statewide concern and occupy the whole field of regulation regarding nutrient management to the exclusion of all local regulations. Upon adoption of the regulations authorized by section 4, no ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way regulate practices related to the storage, handling or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices otherwise regulated by this act if the municipal ordinance or regulation is in conflict with this act and the regulations promulgated thereunder. Nothing in this act shall prevent a political subdivision or home rule municipality from adopting and enforcing ordinances or regulations which are consistent with and no more stringent than the requirements of this act and the regulations promulgated under this act, provided, however, that no penalty shall be assessed under any such local ordinance or regulation for any violation for which a penalty has been assessed under this act.

3 P.S. § 1717.

A recent Bradford County Common Pleas case, McClellan et al v. Granville Township Board of Supervisors, No. 99EQ000016, decided April 6, 2000, ruled that a township zoning ordinance attempting to regulate CAOs that were below the threshold AEU (animal equivalent density) requiring a plan under the Nutrient Management Act was invalid because the Act by its terms preempts “the whole field of regulation
to the exclusion of all local regulation.” The court also noted that although the MPC was cited as authority for adoption of the ordinance, the township had no comprehensive plan or zoning ordinance, and that this was an attempt to regulate only one kind of land use without going through the necessary process to adopt a zoning ordinance.

It is important to note that because Act 68 limits local zoning of “activities related to commercial agricultural production” that exceed the requirements of the Nutrient Management Act “regardless of whether any agricultural operation within the area to be affected by the ordinance would be a concentrated animal operation as defined by the [Nutrient Management Act],” [emphasis added] it extends the “no more stringent” limitation to non-CAO commercial agricultural operations. The effect of this provision is to make non-CAO commercial agricultural operations unregulated in respect of the handling and use of fertilizer and manure except to the extent they voluntarily develop nutrient management plans.

In contrast to the Nutrient Management Act, two other Pennsylvania agricultural statutes, the Agricultural Area Security Law and the Right to Farm Act, permit local “regulations [that] bear a direct relationship to the public health or safety.” The Nutrient Management Act, however, contains no such exception. Thus, it appears that the kind of zoning provisions enacted to protect water supply and to protect the local area of the watershed that were permitted in the case of oil and gas drilling in the Nalbone case, above, may be prohibited by the combination of Act 68 and the Nutrient Management Act in respect of the handling and use of fertilizer and manure in a commercial agricultural production operation.31 It is possible, however, that some local regulation—for example, a wellhead protection ordinance applicable to property owners in aquifer recharge areas—might not be regarded as more stringent than the Nutritional Management Act, since this is an area unregulated by DEP (and in which DEP encourages local regulation). Also, municipalities can regulate to prevent or clean up public nuisances, which are not governed by the provisions or limitations of the MPC. The limitations on this kind of legislation are discussed in the sections below dealing with the Agricultural Area Security Law and the Right to Farm Act.

Act 68 further limits zoning by municipalities “to the extent … that regulation of activities related to commercial agricultural production would exceed the requirements imposed under the Agricultural Area Security Law.” [emphasis added]
The Agricultural Area Security Law\textsuperscript{32} establishes standards and qualifications for the creation of agricultural reserves, called “agricultural security areas,” and for the purchase of conservation easements to preserve farmland in agricultural security areas. Owners of “land used for agricultural production” may propose creation of an agricultural security area of at least 500 acres of “viable agricultural land” under the Agricultural Area Security Law to the governing body of the municipality (or municipalities) in which the land is located. The decision to establish an agricultural security area is made by the local governing body, after notice is published and a public hearing is held, based upon criteria contained in the Agricultural Area Security Law. The Act also provides that the development rights of land within agricultural security areas may qualify to be purchased under the statutory program for the purchase of agricultural conservation easements by the Pennsylvania Department of Agriculture, State Agricultural Land Preservation Board and/or county conservation easement programs. Unlike the Nutrient Management Act that regulates one aspect of commercial agriculture, the Agricultural Area Security Law does not directly regulate farming operations. It provides procedures, such as designation of security areas, purchase of conservation easements and review of proposed condemnations of agricultural security areas, to protect and preserve farm operations and farm land against “urban pressure from expanding metropolitan areas,” and urges local jurisdictions to support agricultural operations, by providing:

(a) General rule—Every municipality or political subdivision within which an agricultural security area is created shall encourage the continuity, development and viability of agriculture within such an area by not enacting local laws or ordinances which would unreasonably restrict farm structures or farm practices within the area in contravention of the purposes of this act unless such restrictions or regulations bear a direct relationship to the public health or safety.

(b) Public nuisance—Any municipal or political subdivision law or ordinance defining or prohibiting a public nuisance shall exclude from the definition of such nuisance any agricultural activity or operation conducted using normal farming operations within an agricultural security area as permitted by this act if such agricultural activity or operation does not bear a direct relationship to the public health and safety. 3 P.S. § 911.

Under above cited section 911, municipalities are permitted to enact ordinances covering agricultural security areas (a) that impose reasonable restrictions on farm structures or farm practices or (b) that place restrictions on farm structures or practices so long as those restrictions bear a direct relationship to public health and safety. Since the declaration of a public nuisance is not a proper subject of a zoning ordinance,\textsuperscript{33} the prohibition against establishing a public nuisance involving externalities resulting from
agricultural operations is beyond the scope of this discussion. It should be noted, however, that the Agricultural Area Security Law permits municipalities to declare that an agricultural activity or operation conducted using normal farming operations is a nuisance if that activity or operation bears a direct relationship to public health and safety.

An Act Protecting Agricultural Operations from Nuisance Suits and Ordinances under Certain Circumstances \(^{34}\) (the Right to Farm Act) was enacted to protect agricultural operations from the consequences of urban pressure from expanding metropolitan areas and the inevitable conflict between incompatible urban and suburban land uses and agriculture:

> It is the declared policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits and ordinances. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this act to reduce the loss to the Commonwealth of its agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances. 3 P.S. § 951.

The Right to Farm Act provides that direct commercial sales of agricultural commodities by a producer on his or her own property cannot be prohibited by zoning or other local legislation and prohibits local ordinances that would otherwise authorize nuisance suits against “any agricultural operation conducted in accordance with normal agricultural operations.”\(^{35}\) The Act 68 limitation that regulation is prohibited to the extent it “would exceed” the Right to Farm Act adds nothing, as a practical matter, to the prohibitions already contained in the Right to Farm Act.

The regulation of public nuisance is an area that will undoubtedly be tested in the courts. Municipalities are advised to proceed cautiously with zoning or public nuisance regulation in the area of regulating the impacts of farming operations. Most ideally, municipalities will work with their farming community, CAOs and non-CAOs, and with the county or state where appropriate, to develop reasonable regulations that encourage farming, while protecting resources and preventing conflicts between uses.
Limits from Act 68 on Planning

Basing zoning and other land use regulations on a sound municipal, multi-municipal, or county comprehensive plan is important to assuring that zoning ordinances are well founded and can be sustained in court. The Growing Smarter amendments to the Municipalities Planning Code impose a broader standard for comprehensive planning than for zoning by providing that comprehensive plans “shall include, but need not be limited to . . . [a] plan for the protection of natural and historic resources to the extent not preempted . . . [that is] consistent with and may not exceed" the requirements of the statutes discussed above, as well as two additional statutes, The Clean Streams Law and Coal Refuse Disposal Control Act.

Preemption applies to legislation, not to planning. In fact, the planning process and comprehensive plans developed under section 301 of the MPC, must take into account many circumstances and conditions that are preempted or otherwise not subject to the control of the municipality for which the plan is being developed, including, for example, major traffic and transit facilities, expressways, highways, public transit routes, airfields, port facilities, railroad facilities, utilities, and hospitals. One of the objectives of planning is to facilitate the coordination of actions of the Commonwealth, agencies, and private firms that otherwise would act independently from, and without regard to, local plans. In order to achieve coordination and cooperation with the Commonwealth and other municipalities, agencies and firms, municipalities must take into account, address and plan for the actual and potential action by these others that affect or may affect the area of the plan and the content of the plan itself. Even though local governments have no jurisdiction over, and are preempted from, regulating expressways and turnpikes, the existence of or plans for transportation facilities, such transportation facilities must be addressed in a comprehensive plan because they have an effect upon the local “movement of people and goods” and may determine “those areas where growth and development will occur.” Similarly, even though the permitting of the development in and around wetlands is under the jurisdiction of the Army Corps of Engineers pursuant to the federal Clean Water Act, local wetlands are natural resources for which planning is appropriate as a basis for development of zoning ordinances to protect and preserve natural resources.

Planning and The Clean Streams Law

The objective of the Pennsylvania Clean Streams Law is to improve the quality of the waters of the Commonwealth, control and eliminate water pollution, and maintain and restore the streams and other waters of the Commonwealth to an unpolluted condition. The Clean Streams Law forms the basis of a
comprehensive watershed management and control program administered by Pennsylvania’s DEP. Among other things, The Clean Streams Law empowers municipalities to raise revenue to fund pollution abatement projects and also makes landowners and occupiers responsible for preventing or correcting conditions that result, or may result, in pollution to the waters of the Commonwealth.⁴⁷

Municipal comprehensive planning and state regulations under The Clean Streams Law will overlap on issues of sewage treatment and water use. The Clean Streams Law acknowledges and incorporates municipal legislation into the overall pollution control and watershed management regulation scheme.⁴⁸ In Reimer v. Board of Supervisors of Upper Mount Bethel Tp.,⁴⁹ a landowner argued that the township’s minimum lot size requirements, which varied from lot to lot depending upon specific slopes, types of soil, water conditions, and depth to bedrock, was invalid because it imposed on-site sewage requirements which were more restrictive that those set by The Clean Streams Law. The court disagreed, saying:

Section 3.106 of the ordinance utilizes shallow depth to bedrock as a density factor if the lot is not served by central sewer. Shallow depth is defined as 0 to 3-1/2 feet. Regulations promulgated by DER [now DEP] pursuant to the authority of [the Sewage Facilities Act] and The Clean Streams Law mandate that no sewage permit shall be issued where a “limiting zone” is found within 20 inches of the “mineral soil” surface. Reimer now argues that the “depth to bedrock” factor is merely a means of supplementing or augmenting DER’s technical requirements for on-site sewage disposal systems, which is impermissible under Middletown Township. We disagree.

Contrary to the type of ordinance invalidated in Middletown Township, section 3.106 does not attempt to regulate the type of sewage system, nor does it purport to set forth requirements for the installation of sewage. The ordinance merely employs “depth to bedrock” and “seasonal high water table” factors to determine density of development, which we have concluded is rationally related to a legitimate public interest. As the trial court recognized, section 3.106 does not directly address sewage at all, but merely controls the size of the lot on which installation may occur.⁵⁰

Many aspects of regulation of The Clean Streams Law have been delegated to municipalities or other local agencies or are jointly monitored and enforced with DEP under Title 25 of the Pennsylvania Code. Therefore, plans that reflect and carry out the delegated or concurrent authority under The Clean Streams Law are permitted. As a practical matter, oversight and permitting functions performed by
DEP should provide assurance to local municipalities that The Clean Streams Law is not being exceeded in the planning for, permitting and administration of sewage facilities, stormwater management, floodplain regulation, stream buffers, wetland protection, or wellhead protection.

Planning and Pennsylvania’s Mineral Extraction Statutes

In general, planning for natural and historic resources that proceeds in a manner consistent with the MPC and the reasonable exercise of the local municipality’s police power to safeguard the health, safety, morals, and general welfare of its citizens should not conflict with or exceed the mineral extraction statutes listed 53 P.S. § 10301(a)(6). Nevertheless, conflicts have arisen where landowners have claimed local regulation exceeded the limitations imposed by Pennsylvania law. Two zoning cases involving the resolution of conflicting setback requirements are instructive to point out one possible area of conflict and to make the point about the greater restraint on planning.

A land owner claimed in the case of Warner Co. v. Zoning Hearing Bd. of Tredyffrin Tp. that the township could not enact setback requirements that were stricter than those imposed by the state under the Non-coal Surface Mining Conservation and Reclamation Act. The distance limitations imposed by the Act providing that “no person shall conduct surface mining operations . . . within 100 feet of the outside line of right-of-way of any public highway; within 300 feet of any occupied dwelling house or commercial or industrial building, unless released by the owner thereof; within 300 feet of any public building, school or community or institutional building; within 300 feet of a public park; or within 100 feet of any cemetery or the bank of any stream” were exceeded by township ordinance provided that “no mining or excavation shall be permitted within 300 feet of: (1) any zoning district boundary line; (2) the right-of-way of any public street; (3) any parcel listed on the National, State or any local Register of Historic Places; (4) any cemetery; (5) any stream, lake or other natural body of water; (6) any residence; or (7) any property line.” The Commonwealth Court ruled that because the township ordinance was within “traditional land use regulations” it was not preempted. The court also held that, absent a showing by the landowner that the setbacks imposed were not related to the public health, safety, morals and general welfare of the community, they constituted a valid exercise of police power: “[i]n this case, the township took into consideration the possibility of a mine collapse, as occurred in another township, and noise and dust associated with quarrying in determining appropriate setbacks.”
In the case of *Miller & Son Paving, Inc. v. Wrightstown Tp.*, the Pennsylvania Supreme Court had to decide whether the Surface Mining Conservation and Reclamation Act superseded a local zoning ordinance that established setbacks for quarrying operations. The land owner argued that because the township’s setback requirements exceeded those contained in the Surface Mining Conservation and Reclamation Act, the township “should have the burden of proof justifying the necessity of having setbacks in excess of the setbacks set by [the Act].” The Court disagreed: “We hold simply that, although the standards set by the Commonwealth may be relevant and competent evidence related to the need for such stringent setback requirements, they do not meet appellant’s burden as a matter of law or shift the burden to the municipality.”

The issue decided in both the *Warner Co.* and the *Miller & Son Paving* cases was whether zoning ordinances were preempted and therefore invalid. The rules for planning are different: if a plan contained provisions or recommendations for setbacks for uses governed by the listed statutes, those setbacks would have to fall within the limits of, and could not exceed, the applicable statute. The limitations on planning under new MPC section 301(a)(6) require that comprehensive plans reflect the limits of the Pennsylvania statutes listed in that section.

Reflecting the General Assembly’s concerns for the potential for pollution and “danger to persons, property or public roads or highways, either by reason of shifting or sliding, or by exposing persons walking onto refuse to the danger of being burned,” the *Coal Refuse Disposal Control Act* declares as a matter of policy that “[i]n order to minimize the exposure to these conditions and dangers, it is better to have a few large coal refuse disposal sites as opposed to numerous small coal refuse sites.” The Coal Refuse Disposal Control Act provides for a “coal refuse disposal control program” administered by DEP that assures safety and the maintenance of air and water quality, for the issuance of permits for and inspection of coal refuse disposal areas, and the evaluation of disposal sites for suitability. Municipal or multimunicipal plans that contain provisions involving the suitability or use of local land for coal refuse disposal will need to consult with DEP and review the provisions of the Coal Refuse Disposal Control Act and applicable regulations for possible conflicting provisions and then modify the plan so that it does not exceed the requirements imposed by the Act.
Planning in communities where farming operations are located generally will not involve any conflicts with the three agricultural statutes listed 53 P.S. § 10301(a)(6). One possible area of conflict is regulation of sales of farm product. Under the Right to Farm Act, “[d]irect commercial sales of agricultural commodities upon property owned and operated by a landowner who produces not less than 50% of the commodities sold” is specifically authorized.

Conflict between the contents of comprehensive plans and the Agricultural Area Security Law may arise where agricultural operations within agricultural security areas are regulated, for example, as to requirements for driveways, parking, number, type, or locations of buildings. While such provisions might not ‘exceed’ the requirements of the Agricultural Area Security Law, they are intended to be prohibited by section 911(a) of the Law which provides that: “[e]very municipality or political subdivision within which an agricultural security area is created shall encourage the continuity, development and viability of agriculture within such an area by not enacting local laws or ordinances which would unreasonably restrict farm structures or farm practices within the area in contravention of the purposes of this act unless such restrictions or regulations bear a direct relationship to the public health or safety.” The mandate of section 911(a) has been a limitation on the terms contained in comprehensive plans since it became effective in 1989. Since agricultural security areas are approved by the municipality or municipalities in which they are located, the comprehensive plans that include these areas should naturally incorporate, reflect and be consistent with the existence of locally approved agricultural security areas. Coordination may be facilitated by the formation of locally formed Agricultural Security Area Advisory Committee as provided for in the Agricultural Area Security Law to work with local planning commissions to assure consistency between planning and the implementation of the Agricultural Area Security Law.

The Nutrient Management Act specifically prohibits local regulation of “practices related to the storage, handling or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices,” from conflicting with, not being consistent with, or being “more stringent” than the provisions of the Nutrient Management Act. Planning, as the basis for such local legislation, is likewise limited. The provisions of Act 68 in new MPC Section 301(a)(6), as was the case with new MPC Section 603(b), discussed above, extend the range of the existing prohibitions under the Nutrient Management Act to non-concentrated animal operations within the area to be affected by the plan.
Conclusion

Although regulation of land use is primarily a matter for local planning and zoning, agriculture, mining, mineral extraction, and uses affecting the quality of Pennsylvania’s waterways and watersheds have been the subject of statewide legislation. Act 68 imposes limits to planning and zoning by providing that planning cannot exceed the terms of identified acts governing mineral extraction activities, agricultural operations, and The Clean Streams Law and that zoning cannot regulate where it is preempted or superseded and, with respect to commercial agricultural production, cannot exceed the terms of three agricultural laws. In most cases, the limitations under Act 68 reflect existing limitations where federal or state laws have and do preempt or supersede local regulation by zoning. Because the scope of comprehensive planning is broader than zoning, the new statutory restrictions on planning require that in situations where the subject matter of planning overlaps the subject matter of the statutes listed MPC Section 30l(a)(6) the terms of the applicable statutory scheme must be reviewed by local officials and their counsel to ensure that those terms are not exceeded.

1 Act of June 23, 2000 (P.L. 495, No. 68).
2 53 Pa.C.S. §§ 10301(a)(6), 10603(b).
5 Skepton, supra, 87 Pa.Cmwlth. at 26, 486 A.2d at 1023-1024.
6 Act of December 19, 1984 (P.L. 3, No.219), 52 P.S. § 3301 et seq.
11 Warner Co., supra, interpreting a statutory section of the Noncoal Surface Mining Conservation and Reclamation Act, 52 P.S § 3316, that is nearly identical to section 17.
13 52 P.S. § 3304(a).
14 60 days after the Noncoal Act enactment date of December 19, 1984.
15 Warner Co., supra.
16 Mcclimans, supra.
17 Warner Co., supra.
19 120 days after the Oil and Gas Act’s enactment date of December 19, 1984.
23 52 P.S. § 1406.2.
24 52 P.S §§ 1406.5d-f, 1406.6. The Bituminous Mine Act was upheld in the famous U.S. Supreme Court case of Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed. 2d 472 (1987) against objections by the mine operators that the act violated the 5th Amendment of the U.S. Constitution and constituted an unlawful taking of private property without compensation.
25 52 P.S. § 1406.7(a).
27 3 P.S. § 1702.
28 Whether a farming operation is a CAO, sometimes called a CAFO (concentrated animal feed operation), is based upon whether the operation exceeds a specific animal units per acre. “The typical statute or regulation defining animal units uses a conversion factor based on some standard to which various animal types are compared numerically.” See for example 40 C.F.R. Part 122, Appendix B, which uses one beef cow as one unit. Jim Schwab, Planning and Zoning for Concentrated Animal Feeding Operations, American Planning Association Planning Advisory Service Report Number 482, 1998, at 38.
29 3 P.S. §§ 1706(h), 1706(b).
31 Further protection for agricultural operations is provided under 25 Pa. Code § 92.4 which exempts pollutants from nonpoint source agricultural activities and irrigation return flows from the National Pollutant Discharge Elimination System (NPDES) permit requirements as implemented by Pennsylvania’s Clean Streams Law.
33 53 Pa.C.S. §§ 10601, 10603(b).
35 3 P.S. § 956.
36 53 P.S. § 10301(a)(6).
37 In Pennsylvania, the formation and adoption of a comprehensive plan are “intermediate and inconclusive steps in the planning process, and in themselves are legally ineffective,” Saenger v. Planning Commission of Berks County, 9 Pa. Cmwlth. 499, 502, 308 A.2d 175, 177 (1973).
38 53 Pa.C.S. § 10301(a)(2).
41 See, 52 Pa.C.S. §§ 10301(d), 10301.3, 10301, 10305, 10619.2(a), 10619.2(b), 11105(a).
43 33 U.S.C. § 1251 et seq.
44 53 Pa.C.S. § 10603(b)(5).


For example, see 25 Pa. Code § 72.2, describing the scope of Chapter 72: “[t]his chapter is adopted in accordance with the duties imposed upon the Department under the [Sewage Facilities Act] and the Clean Streams Law and applies to local agencies [the definition of which includes municipalities] and sewage enforcement officers [who are employed by municipalities, among others] administering the act to persons installing individual or community onlot sewage systems.” See also 25 Pa. Code § 71.66(a)(4) on sewage retaining tanks: “Whenever the local agency issues permits for retaining tanks, the municipality or local agency may impose other conditions it deems necessary for operations and maintenance of the tanks to prevent a nuisance or a public health hazard,” or 25 Pa. Code, Chapter 73 on standards for onlot sewage treatment facilities: “[t]he local agency may restrict the type of materials used by code, ordinance or resolution and shall notify the applicant when restrictions are imposed.”


For example, see 25 Pa. Code § 71.1, 71.53.

See note 7, supra.

52 P.S. § 3311


See note 9, supra.

52 P.S. §§ 1396.4b, 1396.4c.

Miller & Son Paving, supra, 499 Pa. at 89, 451 A.2d at 1006.


52 P.S. §§ 40.56a(b)(1), 40.46a(f), 40.46a(e). One basis for designating an area as unsuitable is that it “will be incompatible with existing State or local land use plans or programs.”

3 P.S. § 953.

9 P.S. § 904.
Surface Mining Conservation and Reclamation Act—
Definitions:

“Surface coal mining activities” shall mean, for the purposes of section 4.6, activities whereby coal is extracted from the earth, from waste or stockpiles or from pits or banks by removing the strata or material which overlies or is above or between the coal or by otherwise exposing and retrieving the coal from the surface. The term shall include, but not be limited to, strip and auger mining and all surface activity connected with surface mining including exploration, site preparation, construction and activities related thereto. The term shall also include all activities in which the land surface has been disturbed as a result of, or incidental to, surface mining operations of the operator, including those related to private ways and roads appurtenant to the area, land excavations, workings, refuse banks, spoil banks, culm banks, tailings, repair areas, storage areas, processing areas, shipping areas, and areas where facilities, equipment, machines, tools or other materials or property which result from or are used in surface mining activities are situated. 52 P.S. § 1396.3.

“Surface mining activities” shall mean the extraction of coal from the earth of from waste or stockpiles or from pits or banks by removing the strata or material that overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip mining, auger mining, dredging, quarrying and leaching, and all surface activity connected with surface or underground mining, including, but not limited to, exploration, site preparation, entry, tunnel, drift, slope, shaft and borehole drilling and construction and activities related thereto; but it does not include those mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings. The term does not include any of the following:

(1) The extraction of minerals by a landowner for his own noncommercial use from land owned or leased by him.

(2) The extraction of sand, gravel, rock, stone, earth or fill from borrow pits for highway construction purposes of the Pennsylvania Department of Transportation or the extraction of minerals pursuant to construction contracts with the department if the work is performed under a bond, contract and specifications that substantially provide for and require reclamation of the area affected in the manner provided by this act.

(3) The handling, processing or storage of slag on the premises of a manufacturer as a part of the manufacturing process.

(4) Those dredging operations that are carried out in the rivers and streams of the Commonwealth and in Lake Erie.

(5) The extraction, handling, processing or storing of minerals from any building construction excavation on the site of the construction where the minerals removed are incidental to the building construction excavation, regardless of the commercial value of the minerals. 52 P.S. § 3303.
Appendix 3A-3: Forestry

By: Marietta H. Barbour, Esquire

Forest Land Planning

More than 50% of the land area of Pennsylvania is covered by forests, almost 12 million acres of which are in private ownership. Forest lands are an important natural resource for Pennsylvania. In addition to the commercial value for the timber products these forests provide, forest lands serve many important ecological functions—flood and erosion control, watershed protection, including groundwater filtration and recharge, air purification, wind, and noise moderation. Forests provide habitat for many species of plants, animals, and other wildlife, as well as recreational opportunities and open space amenities.

Development of a functional plan for forest land starts with an inventory of the forest resources within the community and the identification of the functions they serve for the community. The Service Forester of Pennsylvania’s Bureau of Forestry in DEP assigned to each jurisdiction covered by the plan should be able to assist in identifying forest land areas and their various functions. Maps delineating land-cover inventory may be available from the county planning agency.

The survey should:

- Identify private and public forest lands, that is, those lands covered by forest and related operations that are important to conserve for soil and water quality, for recreation, or as habitat. Forests that are subject to conservation or scenic easements or other restrictions need to be included and noted as such.
- Identify the size, quality, value (its worth in dollars as well as its contribution to the local economy), and composition (the species and age of the trees that predominate, such as mature hardwoods, young conifers, etc.) of each stand.
- Identify which forest lands may be part of an agricultural operation, since forest land held as a part of an agricultural operation may be subject to additional regulatory limitations.
- Determine the nature and scope of community concerns with, and attitudes about, forest land and trees, whether viewed as economic, natural, cultural, or historic assets.
Once the survey is completed, the data collected should be used to evaluate the surveyed forest land as an environmental resource, including its value or necessity to the community for flood and erosion control, ground water filtration and recharge, habitat, recreation, scenic and/or open space. Evaluations may include environmental impact analysis, cumulative impact assessment, critical area analysis, and hazard analysis.

The inventory, evaluation, analysis, and community concerns should then be evaluated in order to prepare the goals, objectives, and policies to be included in the forest land component of the comprehensive plan. The relative value and functions of the various stands of forest once ascertained will determine the priority of protection areas. In addition, a determination and analysis of possible conflicts between landowner goals and public expectations and between forest land resources and any future land use patterns, designated growth areas, or proposed infrastructure improvements, will need to be made. A number of objectives may result from the survey and evaluation process, including:

- preservation of existing forest land;
- reduction in the rate of removal of forest cover;
- encouragement of forestry activity as economic development;
- assured maintenance of tree cover or expansion of tree cover;
- protection of certain specimens, e.g., the largest or oldest of a species (this is very difficult to determine unless historic records exist).

Implementing mechanisms for these objectives might include the development of:

- procedural or permitting requirements for logging activities;
- subdivision ordinance provisions requiring a plan for insuring reproduction of forest;
- tree protection ordinances;
- a forest land overlay zone or a forestry ordinance, separate from the zoning code, which requires submission and approval of a written forestry plan, issuance of a permit and/or compliance with performance based standards.

Other strategies, as alternatives to land use regulation, may include: conservation through forest land acquisition by the local government; conservation easements, including agricultural conservation easements under the Agricultural Area Security Law; a TDR program for forest land; the programs for formal restriction of use and lower assessment value under The Pennsylvania Farmland and Forest Land Assessment Act, known as Clean and Green, and/or Act 515, 16 P.S. 11943.
Certain legal, as well as practical, limitations apply to the local regulation of forestry.

1. The MPC restricts the regulation of forestry. Pennsylvania’s Right to Practice Forestry Act, 53 Pa.C.S. §10603(f), provides that:

   “zoning ordinances may not unreasonably restrict forestry activities. To encourage maintenance and management of forested or wooded open space and promote the conduct of forestry as a sound and economically viable use of forested land throughout this Commonwealth, forestry activities, including, but not limited to, timber harvesting, shall be a permitted use by right in all zoning districts in every municipality.”

Forestry is defined (53 Pa.C.S. §10107) as:

   “the management of forests and timberland when practiced in accordance with accepted silvicultural principles, through developing, cultivating, harvesting, transporting and selling trees for commercial purposes, which does not involve any land development.”

The prohibition of logging would violate the “permitted use by right in all zoning districts.”

2. Reasonable restrictions on forestry activities are permitted, and activities that are not in accordance with accepted silvicultural principles may be prohibited. The booklet entitled, Best Management Practices for Pennsylvania Forests, by the Best Management Practices Task Force of the Forest Issues Working Group, published by Pennsylvania State University, 1996, is accepted by Pennsylvania foresters as a statement of best practices. According to Best Management Practices, because of the age and species of Pennsylvania forests, a prohibition of clear cutting or a requirement that a harvest be limited to only the largest trees, would be unreasonable as contrary to acceptable Pennsylvania silviculture and could therefore be the basis of landowner objections.

3. Forest land and forestry within an agricultural security area are subject to the further limitation on local regulations under the Agricultural Area Security Law, which provides that:
“every municipality or political subdivision within which an agricultural security area is created shall encourage the continuity, development and viability of agriculture within such an area by not enacting local laws or ordinances which would unreasonably restrict farm structures or farm practices within the area in contravention of the purposes of this act unless such restrictions or regulations bear a direct relationship to the public health or safety.”

The Agricultural Area Security Law protects the customary forestry practices of farmers in an agricultural security area because “timber, wood and other wood products derived from trees” are included within the statutory definition of a crop.

4. Road damage from logging activities is frequently a matter of local concern. PENNDOT, under 67 Pa. Code 189, et seq., provides bonding requirements for use of state highways and highways under the jurisdiction of local authorities where loads will be in excess of posted limits. Highway occupancy permits are required from PENNDOT for new logging, driveways, or access roads to state highways. Some townships will also require highway occupancy permits for access to township roads.

5. Timber harvesting operations that involve earth disturbance of more than 25 acres must obtain a permit from DEP based upon submission and approval of an erosion and sedimentation control plan.

6. A permit or waiver is required for installation of a culvert, bridge, dam or other water obstruction or encroachment of any Pennsylvania watercourse. The permit may be acquired from the County Conservation District or, in some counties, DEP’s Bureau of Dams and Waterways Management.

7. One practical consideration is whether the municipality is in a position to enforce permitting or forestry plan approval provisions. Generally speaking, a zoning officer would not be qualified to evaluate a forestry plan or enforce performance standards based upon a ‘best practices’ standard. Therefore, a municipality enacting local regulation of forestry practices would need to be prepared to engage a consulting forester.

8. Another practical consideration is that an owner of forest land who is limited by regulation in the financial return from her or his stand of timber may be motivated to sell the forestland to a developer.
The following model forestry ordinance was developed by the Penn State Forestry Extension. For more information, see Penn State College of Agricultural Sciences’ Timber Harvesting in Pennsylvania, Pennsylvania State University, 2001, or contact Michael Jacobson, Assistant Professor, Penn State School of Forest Resources.

**Pennsylvania Model Forestry Regulations**

**Using the Model**

Before deciding to adopt any ordinance regulating forestry activities, your community should carefully weigh the questions raised in “Timber Harvesting in Pennsylvania.” Adoption of local regulations is not the answer for all communities.

If your community decides that regulations are necessary, the following model ordinance may be helpful. It was first developed in 1994 by a team of professional foresters led by Penn State’s School of Forest Resources and was updated in January 2000 to conform to the new forestry-related changes to the Municipal Planning Code effected by Acts 67 and 68 of 2000.

The model is intended to address fairly the needs and concerns of local citizens as well as forest landowners and the forestry industry. It is also designed to be consistent with the so-called “Right to Practice Forestry” provision (P.S.§10603(f)) of the Municipalities Planning Code.

This model is best applied with the assistance of a professional forester who has the expertise to help ensure that the final regulations are tailored to your community’s particular circumstances. “Timber Harvesting in Pennsylvania” provides information on how to make contact with a professional forester. Other interested members of the forestry community, such as landowners, loggers, and forest products manufacturers, should also be given an opportunity to become involved in developing the ordinance.

1This informational booklet, published by the Penn State School of Forest Resources, is available from the Pennsylvania State Association of Township Supervisors (telephone: 717-763-0930); Pennsylvania Department of Community and Economic Development, Governor’s Center for Local Government Services (telephone: 717-783-0176); Pennsylvania Department of Agriculture, Hardwoods Development Council (telephone: 717-772-3715); Penn State School of Forest Resources (telephone: 814-863-0401); Pennsylvania Department of Conservation and Natural Resources, Bureau of Forestry District offices; Pennsylvania Forestry Association (telephone: 717-766-5371); and the Hardwood Lumber Manufacturers Association of Pennsylvania (telephone: 717-322-1244)

**Model Regulations**

**Section 1. Policy; Purpose.** In order to conserve forested open space and the environmental and economic benefits they provide, it is the policy of the Township [Borough] of ______ to encourage the owners of forest land to continue to use their land for forestry purposes, including the long-term production of timber, recreation, wildlife, and amenity values. The timber harvesting regulations contained in sections 1 through 8 are intended to further this policy by (1) promoting good forest stewardship; (2) protecting the rights of adjoining property owners; (3) minimizing the potential for adverse environmental impacts; and (4) avoiding unreasonable and unnecessary restrictions on the right to practice forestry.

**Section 2. Scope; Applicability.** To encourage maintenance and management of forested or wooded open space and promote the conduct of forestry as a sound and economically viable use of forested land throughout the township [borough], forestry activities, including timber harvesting, shall be a permitted use by right in all zoning districts. Sections 1 through 8 apply to all timber harvesting within the Township [Borough] where the value of the trees, logs, or other timber products removed exceeds $1,000. These provisions do not apply to the cutting of trees for the personal use of the landowner or for pre-commercial timber stand improvement.

**Section 3. Definitions.** As used in Sections 1 through 8, the following terms shall have the meanings given them in this section.

a. “Felling” means the act of cutting a standing tree so that it falls to the ground.

b. “Forestry” means the management of forests and timberlands when practiced in accordance with accepted silvicultural principles, through developing, cultivating, harvesting, transporting and selling trees for commercial purposes, which does not involve any land development.

c. “Landing” means a place where logs, pulpwood, or firewood are assembled for transportation to processing facilities.

d. “Litter” means discarded items not naturally occurring on the site such as tires, oil cans, equipment parts, and other rubbish.

e. “Lop” means to cut tops and slash into smaller pieces to allow the material to settle close to the ground.

f. “Operator” means an individual, partnership, company, firm, association, or corporation engaged in timber harvesting, including the agents, subcontractors, and employees thereof.

Continued on next page →
g. “Landowner” means an individual, partnership, company, firm, association, or corporation that is in actual control of forest land, whether such control is based on legal or equitable title, or on any other interest entitling the holder to sell or otherwise dispose of any or all of the timber on such land in any manner, and any agents thereof acting on their behalf, such as forestry consultants, who set up and administer timber harvesting.

b. “Pre-commercial timber stand improvement” means a forest practice, such as thinning or pruning, which results in better growth, structure, species composition, or health for the residual stand but which does not yield a net income to the landowner, usually because any trees cut are of poor quality, too small or otherwise of limited marketability or value.

i. “Skidding” means dragging trees on the ground from the stump to the landing by any means.

j. “Slash” means woody debris left in the woods after logging, including logs, chunks, bark, branches, uprooted stumps, and broken or uprooted trees or shrubs.

k. “Stand” means any area of forest vegetation whose site conditions, past history, and current species composition are sufficiently uniform to be managed as a unit.

l. “Stream” means any natural or artificial channel of conveyance for surface water with an annual or intermittent flow within a defined bed and banks.

m. “Timber harvesting,” “tree harvesting,” or “logging” means that part of forestry involving cutting down trees and removing logs from the forest for the primary purpose of sale or commercial processing into wood products.

n. “Top” means the upper portion of a felled tree that is unmerchantable because of small size, taper, or defect.

o. “Wetland” means areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions including swamps, marshes, bogs, and similar areas.

Section 4. Notification; preparation of a logging plan.

a. Notification of commencement or completion. For all timber harvesting operations that are expected to exceed ___ acres, the landowner shall notify the township [borough] enforcement officer at least ___ business days before the operation commences and within ___ business days before the operation is complete. No timber harvesting shall occur until the notice has been provided. Notification shall be in writing and shall specify the land on which harvesting will occur, the expected size of the harvest area, and, as applicable, the anticipated starting or completion date of the operation.

b. Logging plan. Every landowner on whose land timber harvesting is to occur shall prepare a written logging plan in the form specified by this ordinance. No timber harvesting shall occur until the plan has been prepared. The provisions of the plan shall be followed throughout the operation. The plan shall be available at the harvest site at all times during the operation and shall be provided to the township [borough] enforcement officer upon request.

c. Responsibility for compliance. The landowner and the operator shall be jointly and severally responsible for complying with the terms of the logging plan.

Section 5. Contents of the logging plan.

a. Minimum requirements. As a minimum, the logging plan shall include the following:

(1) Design, construction, maintenance, and retirement of the access system, including haul roads, skid roads, skid trails and landings;

(2) Design, construction, and maintenance of water control measures and structures such as culverts, broad-based dips, filter strips, and water bars;

(3) Design, construction, and maintenance of stream and wetland crossings; and

(4) The general location of the proposed operation in relation to municipal and state highways, including any accesses to those highways.

b. Map. Each logging plan shall include a sketch map or drawing containing the following information:

(1) Site location and boundaries, including both the boundaries of the property on which the timber harvest will take place and the boundaries of the proposed harvest area within that property;

(2) Significant topographic features related to potential environmental problems;

(3) Location of all earth disturbance activities such as roads, landings, and water control measures and structures;

(4) Location of all crossings of waters of the Commonwealth; and

(5) The general location of the proposed operation to municipal and state highways, including any accesses to those highways.

c. Compliance with state law. The logging plan shall address and comply with the requirements of all applicable state laws and regulations including, but not limited to, the following:

Continued on next page ➔
Section 8. Enforcement.

a. Township [Borough] Enforcement Officer. The [ ] shall be the enforcement officer for sections 1 through 8.

b. Inspections. The township [borough] enforcement officer may go upon the site of any timber harvesting operation before, during, or after active logging to (1) review the logging plan or any other required documents for compliance with sections 1 through 8 and (2) inspect the operation for compliance with the logging plan and other on-site requirements of these regulations.

c. Violation notices; suspensions. Upon finding that a timber harvesting operation is in violation of any provision of sections 1 through 8, the township [borough] enforcement officer shall issue the operator and the landowner a written notice of violation describing each violation and specifying a date by which corrective action must be taken. The township [borough] enforcement officer may order the immediate suspension of any operation upon finding (1) corrective action has not been taken by the date specified in a notice of violation; (2) the operation is proceeding without a logging plan; or (3) the operation is causing immediate harm to the environment. Suspension orders shall be in writing, issued to the operator and the landowner, and remain in effect until, as determined by the township [borough] enforcement officer, the operation is brought into compliance with sections 1 through 8 or other applicable statutes or regulations. The landowner or the operator may appeal an order or decision of an enforcement officer within thirty days of issuance to the governing body of the Township [Borough].

d. Penalties. Any landowner or operator who (1) violates any provision of sections 1 through 8; (2) refuses to allow the township [borough] enforcement officer access to a harvest site pursuant to paragraph (b) of this section or who fails to comply with a notice of violation or suspension order issued under paragraph (c) of this section is guilty of a summary offense and upon conviction shall be subject to a fine of not less than one hundred dollars nor more than three hundred dollars, plus costs, for each separate offense. Each day of continued violation of any provision of sections 1 through 8 shall constitute a separate offense.

Continued from prior page:

(1) Erosion and sedimentation control regulations contained in 25 Pennsylvania Code, Chapter 102, promulgated pursuant to the Clean Streams Law (35 P.S. §§691.1 et seq.);

(2) Stream crossing and wetlands protection regulations contained in 25 Pennsylvania Code, Chapter 105, promulgated pursuant to the Dam Safety and Encroachments Act (32 P.S. §§693.1 et seq.); and

d. Relationships of state laws, regulations, and permits to the logging plan. Any permits required by state laws and regulations shall be attached to and become part of the logging plan. An erosion and sedimentation pollution control plan that satisfies the requirements of 25 Pennsylvania Code, Chapter 102, shall also satisfy the requirements for the logging plan and associated map specified in paragraphs (a) and (b) of this section, provided that all information required by these paragraphs is included or attached.

Section 6. Forest practices. The following requirements shall apply to all timber harvesting operations in the Township [Borough].

a. Felling or skidding on or across any public thoroughfare is prohibited without the express written consent of the Township [Borough] or the Pennsylvania Department of Transportation, whichever is responsible for maintenance of the thoroughfare.

b. No tops or slash shall be left within twenty-five feet of any public thoroughfare or private roadway providing access to adjoining residential property.

c. All tops and slash between twenty-five and fifty feet from a public roadway or private roadway providing access to adjoining residential property or within fifty feet of adjoining residential property shall be lopped to a maximum height of four feet above the surface of the ground.

d. No tops or slash shall be left on or across the boundary of any property adjoining the operation without the consent of the owner thereof.

e. Littering resulting from a timber harvesting operation shall be removed from the site before it is vacated by the operator.

Section 7. Responsibility for road maintenance and repair; road bonding. Pursuant to Title 75 Pennsylvania Consolidated Statutes, Chapter 49; and Title 67 Pennsylvania Code, Chapter 189, the landowner and the operator shall be responsible for repairing any damage to Township [Borough] roads caused by traffic associated with the timber harvesting operation to the extent the damage is in excess of that caused by normal traffic may be required to furnish a bond to guarantee the repair of such damages.
Appendix 3A-4: Planning for Historic Resources

By: Marietta H. Barbour, Esquire

Historic Preservation Planning

Pennsylvania has a rich heritage of nationally recognized historic and prehistoric resources including archeological sites, monuments, battlefields, and buildings. Virtually every community in the Commonwealth has buildings, sites, and other historic resources of local or regional importance. Pennsylvania law recognizes the value of the Commonwealth’s historic resources. Article I, Section 27 of Pennsylvania’s Constitution states that citizens have “the right to clean air, pure water, and to the preservation the natural, scenic, historic and esthetic values of the environment.” As discussed in Chapter 3.4, under case law, the state and local municipalities are trustees for these resources.

Now under the MPC amendments of 2000, municipalities that plan shall include a plan for historic resources (Section 301(a)(6)), and if they zone, their zoning ordinance must provide protection for their historic features and resources (Section 603(g)(2)).

Unlike natural resources, such as forest lands that are visible even to the most casual observer, historic resources often require historic or architectural research for proper identification. Only resources that can be identified and established as historic (or prehistoric) and located on a map, can be legislatively protected under the MPC. Therefore, zoning for historic resources must be based upon planning that starts with an historic resource survey. Historic resource surveys usually identify, through a detailed inventory, all historic resources within the boundaries of the survey, and may include legal descriptions and ownership data, local histories of owners and neighborhoods, photographic documentation, drawings, evaluations of the present condition of the historic structures, interpretation and analysis of survey data useful to developing a historic resource plan.¹

An historic resources survey serves three important purposes: (1) it assures balanced and full consideration of all surveyed resources on their merits as historic resources; (2) it provides a researched, factual basis to justify the exercise of police power over identified resources; and (3) it provides detailed, particularized information about specific local resources that can serve as the basis for the development of guidelines and regulations to protect those local resources.
Surveys should be designed, overseen, and the analysis and evaluation performed by an historic preservation consultant or individual or firm with expertise in local history, architectural history, or other relevant field, who also has access to other fields necessary to evaluate the particular resources involved (such as archeology or history of manufacturing or technology). Once the consultant has designed the survey, volunteers can do much of the field work. Since inventories of historic and prehistoric resources have been conducted and maintained by many different organizations over the years, it is important to coordinate with and use available information and systems.

Technical assistance and/or funding for development of a historic resource plan may be available from the Bureau of Historic Preservation of the Pennsylvania Historical and Museum Commission (BHP). Under the History Code, 37 Pa C.S. 101 et seq., first enacted as the Pennsylvania Historic Preservation Act in 1978, the Pennsylvania Historical and Museum Commission (PHMC) is charged with: maintaining information on the historic and archeological resources of the Commonwealth; advising public officials on projects or undertakings that may effect historic resources; seeking funding from both the federal government and private resources for the Historic Preservation Program; significance; and, providing information and technical assistance.

The survey data and the preservation consultant will help the community determine the standards a historic site or structure will need to meet for inclusion in the group of resources to be protected. Most standards require structures to be at least 50 years old and have significance in American history or to be associated with an historical event or figure. Local criteria can also be developed. Many communities incorporate and follow the criteria and standards set by the U.S. Department of the Interior for the National Register of Historic Places and use “The Secretary of the Interior’s Standards for the Treatment of Historic Properties” as the basis for guidelines for rehabilitation or alterations in historic districts.

Based upon the completed survey, a historic resource plan is developed. The plan for historic resources should include the goals and policies needed to protect the municipality’s resources and may include one or more of the following as recommendations or strategies to achieve the goals:

- Nomination of individual resources or one or more districts for listing on the National Register of Historic Places.
- Establishing one or more local historic districts and implementing appropriate regulations and design guidelines through an Historic Architectural Review Board (HARB) under 53 P.S. § 8001 et seq.
• Enacting one or more historic overlay zones.
• Establishing a Main Street Program for an existing downtown center.
• Establishing a program for donation and/or purchase of facade or other conservation easements.
• Appointment of a historical commission to act as an advisory council on matters relating to the protection of historic resources.
• Developing historic resources for their potential for tourism.
• Developing a transfer of development rights program for historic resources.

Designation of a historic district or zone will be ineffective to protect the buildings within the district if, for example, off-street parking requirements necessitate demolition of historic structures or modern, multi-story office towers can be built there. Integrating the goals and policies of historic preservation with zoning and subdivision requirements is therefore essential to effective protection of historic resources. In particular, off-street parking, setback, height, bulk, and signage provisions should be reviewed and revised, if appropriate, to allow the development within the historic district or zone consistent with appropriate protection of the historic character, significance, and integrity of the buildings within the district. In addition, through application of building code provisions that address the particular circumstances of historic structures and by allowing additional compatible uses within historic districts, municipalities can encourage adaptive reuse of historic structures and facilitate investment in historic areas.

Certain legal as well as practical limitations apply to the regulation of historic resources.

1. An important procedural safeguard in an historic district ordinance is the hardship review which allows reconsideration of a denial of a certificate of appropriateness on the grounds of financial hardship. In addition to allowing the parties time and a forum in which to resolve the matters at issue, and to explore alternatives or identify possible funding sources, this kind of procedural safeguard mitigates against “takings” claims.
2. IRS tax credits may be available for rehabilitations of National Register properties. A historic resources policy that encourages National Register listing and follows the Secretary of the Interior’s standards and guidelines for rehabilitation will assist owners (who otherwise qualify) in being able to improve their properties through use of IRS’s tax credit program.
3. Because the management of historic resources requires a knowledge of history, archaeology, technology, construction, architecture, or other pertinent fields, a HARB or historical commission is
needed to advise the governing body or zoning officer on historic preservation matters. Pennsylvania’s Local Historic District Act mandates the qualifications for members of a HARB, and often qualified persons to serve on such advisory boards are hard to find.

4. Churches have consistently made First Amendment objections to local preservation measures, but in general the free exercise of religion is not diminished by regulatory measures to protect historic resources, including churches. The Religious Land Use and Institutionalized Persons Act of 2000, Public Law 106-274, signed into law by President Clinton on September 22, 2000, (after the Religious Freedom Restoration Act of 1993 was declared unconstitutional in an historic preservation case) is expected to be the basis of new challenges to the application of local preservation regulations to historic buildings owned or used by churches and other religious institutions.

A PHMC outline of Pennsylvania Preservation Ordinances is attached, as well as PHMC’s description of the new MPC authority to plan for and protect historic resources.

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2 For example, the U.S. Department of the Interior’s National Register of Historic Places, Pennsylvania’s Bureau of Historic Preservation’s register listing historic resources of state significance, as well as those sponsored by colleges and universities, local historical societies and historic preservation organizations, and those conducted by counties as part of their mandated comprehensive plans, which may include mapping and GIS resources.

3 For information about preservation services of the BHP see: http://www.phmc.state.pa.us/bhp/overview.

4 Main Street is a program of historic downtown redevelopment created by the National Trust for Historic Preservation (see www.mainst.org), for which funding is available from the Main Street Office at DCED within the Office of Community Development and Housing, Program Development and Support Division.
An Outline

Excerpted from PHMC’s “Part I: The Pennsylvania Historic Preservation Program.”

IV) PENNSYLVANIA PRESERVATION ORDINANCES

State enabling legislation allows counties, cities, boroughs, incorporated towns and townships in Pennsylvania to establish by ordinance historic districts and control change within the district. Pa. Stat. Ann. tit. 53 & 8001 et seq. (Purdons 1972 & Purdons Supp. 1981). As of the year 2000, local governments have established 91 local historic districts, primarily in the eastern portion of the state. To implement the legislation, the local governing body should:

A) Define by ordinance boundaries of the historic district.

B) Submit the proposed district ordinance to the Pennsylvania Historical and Museum Commission for certification by resolution of the historical significance of the district.

C) Establish a Board of Historical Architectural Review (HARB) with certain professional qualifications such as a registered architect, building inspector, and licensed real estate broker.

   The HARB reviews all permits for alterations, new construction and demolitions within the boundaries of the historic district and recommends to the local governing body on whether a certificate of appropriateness should be issued.

D) Request for Permit—Preliminary review of a development proposal with the HARB may resolve many questions in advance.

E) When the HARB does not recommend approval of a project to the governing body or that body disapproves a permit; they have to indicate what changes could be made to make the project acceptable.

F) Appeals—Under the state enabling legislation “appeals are to be taken in the same manner as appeals from decisions of the agency charged by law or local ordinance with the issuance of permits for such building changes.” 53 P.S. 8004 (d).

G) Philadelphia and Pittsburgh Ordinances—Under the language of the state enabling legislation “cities of the first and second class” are specifically exempted from the requirements of the Act.

Note: The Philadelphia Historical Commission is covered in another section of this publication.
V) PENNSYLVANIA MUNICIPALITIES PLANNING CODE—53 § 10101

A) The authority to regulate land use in the Commonwealth is found in the municipalities Planning Code. The Pennsylvania Municipalities Planning Code was amended in the spring of 2000 (Act 67 and 68) to include additional authority for local governments to plan for and protect historic resources.

1) Section 105—provides amendments to the purpose of the Act to promote and encourage the preservation of the Commonwealth’s historic resources as well as prime agricultural land and natural resources.

2) Section 107—adds explicit definitions for “traditional neighborhood development” and “village.” Both of these provisions could be used to protect older and historic communities and to allow them to grow in compatible ways.

3) Section 301—preparation of comprehensive plans has been amended to require that a plan for the protection of natural and historic resources be included in municipal, multi municipal, or county comprehensive plans. This requirement is subject to the provisions of other federal or state laws regulating mineral, agricultural, and forestry.

4) Section 601—also states that zoning ordinances shall provide for the protection of natural and historic features and resources.

B) Many townships have already taken this approach to protecting their dispersed cultural resources. Chester County, for example, encourages townships to establish historical commissions, identify historic resources and protect them through zoning. It is expected that many more townships and counties will develop historic preservation plans as they revise their comprehensive planning documents.

Bibliography


Appendix 3A-5: French Creek Communities
Regional Visioning Process Summary

The following description is excerpted from the French Creek Communities Regional Visioning Process Summary and Landscape Policy Plan Development provided by Brian J. Hill, Director, French Creek Project. For a copy of the complete document, contact 10,000 Friends of Pennsylvania.

This project was spearheaded by West Mead Township Supervisor Chairman, Daniel Minick; Meadville City Councilman, Brian Hill; and Vernon Township Manager, David Stone. The French Creek Communities received funding for the joint effort through the Allegheny College Center for Economic and Environmental Development and the PA DCED. In addition, in-kind services have been provided by Allegheny College students and professors, as well as the Crawford County Planning Commission staff. The Pennsylvania Environmental Council staff facilitated the process. For more information on the French Creek Project, visit http://frenchcreek.allegheny.edu/.

In September 1997, the West Mead Township Board of Supervisors approached the Center for Rural Pennsylvania to facilitate preliminary community visioning exercises. A televised session held in October generated resident interest in the participatory process. In February 1998, the first community-wide meeting was held by West Mead Township, facilitated by the Center for Rural Pennsylvania staff. A significant number of township residents and representatives from the abutting municipalities (the City of Meadville and Vernon Township) participated. Allegheny College agreed to contribute money to get the process started and hired a facilitator. As a result of the meeting, the three municipalities agreed to conduct a more comprehensive regional visioning effort and voted to call themselves “the French Creek Communities.” It was believed that a regional approach to community planning would be more productive for the Greater Meadville Area in that the three municipalities:

- share one school district (Central Crawford County School District),
- share public water and sewer services,
- participate in regional level civic and business associations,
- are served by one Chamber of Commerce, and
- are dependent upon each other socially and economically (retail/service/manufacturing/downtown/medical/college community).

The French Creek Communities selected the Pennsylvania Environmental Council to act as facilitator for the community-based process. It is important to note that as the French Creek Communities Regional Visioning Project got underway, the County of Crawford was also beginning an extensive county-level visioning effort as part of their comprehensive plan update. Throughout this process the region and county have worked together so as to combine efforts where appropriate. In addition, the county planning staff has participated and assisted in facilitating visioning exercises.
In the French Creek Communities, the process entailed a number of separately conducted visioning exercises with various segments of the community, interviews for key community leaders, and focus groups with minority and special need populations. A listing of each component is provided below:

- Meetings with Civic and Business Organizations
- Elder Visioning Exercise
- Student Visioning Exercise
- Key Person Interviews
- Special Focus Group Sessions

Now the French Creek Communities needed to form a collective vision. It was time to bring everyone together in a community meeting, present and discuss what was suggested by individual groups, and develop a vision for the French Creek Communities as a whole. A two-part community meeting was held. Following the presentations, attendees conducted their own visioning exercises, identifying where they live and work, important places, regional strengths, challenges, and priorities. The second evening attendees became the developers and community planners through role-playing three possible development scenarios. Their participation in such an activity increased community awareness of municipal land use regulations, the role of a municipal official, impacts associated with development, and how to possibly minimize such impacts. Through its citizenry, the French Creek Communities have now developed a vision of their own. Based upon community input, high and community-based priorities for the region were identified. These priorities are general in nature and serve as the basis for the draft Landscape Policy Plan.

Upon the completion of the regional visioning process, officials of the French Creek Communities came together to begin the development of a landscape policy plan. Priorities identified through the process from the first step in the planning process and indicate what is important to the regional community. The community priorities were then translated into possible actions and represent the focus for the community's future vision and guide for future development and conservation opportunities. Goals and actions were developed for review by the community and local officials of West Mead and Vernon Townships, and the City of Meadville.

The French Creek Landscape Policy Plan was adopted separately by the governing bodies of the participating municipalities during December 1999. Since that time, actions are being implemented by the municipalities and other local entities. The plan serves as a solid foundation from which to build their community. It is and will continue to be a work in progress.