Chapter 6: Implementation

Appendix 6A-1: Sample Implementation Agreement

INTERGOVERNMENTAL COOPERATIVE AGREEMENT
IMPLEMENTING THE XYZ MULTIMUNICIPAL PLAN

THIS INTERGOVERNMENTAL COOPERATIVE AGREEMENT IMPLEMENTING THE XYZ MULTIMUNICIPAL PLAN is created by and among the municipalities listed below (collectively, the Participants):

Municipality X
Municipality Y
Municipality Z


THIS AGREEMENT SHALL BE EFFECTIVE upon the passage of an ordinance by the governing body of each of the Participants adopting this Agreement.

BACKGROUND

A. The Participants are parties to an Intergovernmental Cooperation Agreement for Multimunicipal Planning, effective as of ____________ (the ‘Planning Agreement’). In the Planning Agreement the Participants established the XYZ Area Planning Committee (the “Committee”). Pursuant to the requirements of the Planning Agreement, the Committee developed the XYZ Multimunicipal Comprehensive Plan for the Participants (“the Plan”). Each of the Participants has adopted the Plan as their comprehensive plan pursuant to the requirements of Article III of the Municipalities Planning Code (the “MPC”).
B. In the process of preparing the Plan, the Committee also reviewed each Participant’s zoning ordinance, subdivision and land development ordinance, and other ordinances regulating land development. The Committee identified areas where the existing ordinances are not generally consistent with the Plan and made recommendations to the governing body of each Participant concerning the amendments that are considered necessary to conform their ordinances to the Plan and to achieve general consistency between their ordinances and the Plan.

C. Section 1104 of the MPC requires municipalities that have developed a multimunicipal comprehensive plan to enter into an intergovernmental cooperative agreement to implement that plan. Section 303(d) of the MPC further provides that municipal zoning, subdivision and land development regulations and capital improvement programs shall generally implement the multimunicipal plan. The Participants hereby adopt this Implementation Agreement to establish the process for achieving general consistency between the Plan and the land development ordinances of each Participant, to establish a dispute resolution mechanism, to establish a process for the review and approval of developments of regional significance, and to establish the role and responsibilities of the participating municipalities with respect to implementation of specific provisions of the Plan, including provisions for infrastructure, affordable housing and the purchase of real property, rights-of-way and easements, the establishment of growth areas, rural resource areas, rural reserve areas, and to provide for required reporting.

NOW THEREFORE, in order to implement the XYZ Multimunicipal Comprehensive Plan, and to comply with the requirements the MPC, and to avail themselves of the powers conferred upon municipalities that develop and implement multimunicipal comprehensive plans under the MPC, as an exercise of their police power to protect the health, safety and welfare of the citizenry, and in furtherance of their obligations as trustees of the natural, scenic and historic resources of the Commonwealth, and intending to be legally bound, each Participant agrees as follows:

1. Adoption of Conforming Ordinances.

Within two years after adoption of the Plan, each Participant will implement the Plan by adopting, amending or otherwise conforming its zoning ordinance, its subdivision and land development ordinance, its capital improvement plan and any other ordinances, plans or regulations related to land development, such as the regulation of flood plains, wetlands, stormwater, steep slopes, and historic districts, ("land development ordinances") as necessary so that they are generally consistent with the Plan. Any amendment, revision, extension, supplement or modification of the Sewage Facilities Plan, including approval of a private development planning module, shall be generally consistent with the Plan.
2. Determining and Achieving General Consistency.

(a) The Committee Shall Determine Consistency.

The XYZ Area Planning Committee shall continue as provided in the XYZ Area Planning Agreement. The Committee is authorized to review the density and land use provisions of the land development ordinances of each Participant to determine whether they are generally consistent with the Plan. The Committee is authorized to retain the services of qualified consultants to assist in the consistency review and determination. The recommendations of the County planning agency, the sub-committee or the consultant are not binding on the Committee, which shall make the final determination on general consistency.

(b) “General Consistency” Standards.

When evaluating a Participant’s ordinances for “general consistency,” the Committee shall examine what is allowed by existing land development ordinances. The Committee shall determine whether there is a “reasonable, rational, similar connection or relationship” between the land development ordinances of each Participant and the provisions of the Plan. (MPC Section 107.) The Committee shall focus specifically on whether the goals, policies, and guidelines of the Plan are compatible with the location, types, densities, and intensities of uses permitted by existing zoning ordinances. The Committee shall also determine whether infrastructure plans, capital spending plans, sewage facilities plans, and development parameters set forth in the land development ordinances of each Participant are generally consistent with the plan. The Committee shall examine the compatibility of each Participant’s developed landscape with the Plan. The Committee shall also determine whether the Participant utilized similar data and projections in the development of its ordinances as were utilized by the Committee in developing the Plan.

(c) Amendment of Ordinances.

Participants agree to make the revisions to their land development ordinances and regulations that are necessary to make them generally consistent with the Plan within two years of adopting the Plan. If a Participant feels an ordinance is already generally consistent with the Plan that has been identified by the Committee as not generally consistent with the Plan, the Participant, the Committee, or any other Participant may engage the dispute resolution provisions of Section 7 to resolve the disagreement. If, as a result of the dispute resolution process, it is determined that the Participant’s ordinances are not generally consistent with the Plan, the Participant shall, after complying with all applicable procedural requirements of the MPC and any other statutes, amend its ordinances to make them generally consistent with the Plan.
(d) Advance Notification of Ordinance Amendments.

Whenever any Participant proposes to amend a land development ordinance, for any reason, it shall provide a copy of the proposed amendment to the Committee, and to each Participant, along with a statement as to the sponsoring Participant’s view of the proposed amendment’s general consistency with the Plan. This notice shall occur prior to any action by the Participant to adopt the proposal. The Participant shall agree to defer action on the proposal for an additional thirty days if requested by the Committee or any other Participant.

(e) Committee Review of Amendments Prior to Adoption.

The Committee shall review each proposed amendment to a land development ordinance to determine whether the ordinance will be generally consistent with the Plan if the amendment is adopted as proposed. If it is determined that the land development ordinances of the Participant will become or remain generally consistent with the Plan if the amendment is enacted, the Committee shall so advise the Participant, which shall be free to act on the amendment. No ordinance may be adopted that is inconsistent with the comprehensive plan.

(f) Procedure when Committee Determines Proposal is Not Generally Consistent.

If the Committee determines that the proposal is not generally consistent with the Plan, or, in the case of a proposal submitted to rectify a previously identified consistency problem, that the proposal is insufficient to bring the Participant’s ordinances into a state of general consistency with the Plan, the Committee shall so advise the Participant sponsoring the proposal. The notice shall be in writing and shall include a statement of the perceived inconsistency and an indication of what changes could be made to the proposal to eliminate the conflict, if possible. Upon receipt of notification that the proposal is unacceptable to the Committee, the Participant shall either modify the proposal to satisfy the objections of the Committee, seek an amendment to the comprehensive plan, or submit the matter to the dispute resolution process as outlined below. Where the Participant elects to modify the proposal, it shall resubmit the proposal as modified to the Committee for further review prior to enactment.

(g) Maintaining Consistency.

Any time a Participant is required to make a submission to ‘the planning agency’ or to the county planning agency under the MPC, the Participant shall also make an identical submission, at the same time, to the secretary of the Committee. The Committee shall have the right to submit comments, recommendations, or proposed amendments to the Participant and to appear and comment before the body or board that is to take action on the matter.
3. Developments of Regional Significance.

(a) Defined.

Developments of regional significance and impact are defined in MPC Section 107 as “any land development that, because of its character, magnitude or location, will have substantial effect upon the health, safety or welfare of citizens in more than one municipality.” [The Participants may include any projects they deem to be of regional significance—some examples include: airports, industrial parks, truck terminals, shopping malls and retail centers in excess of ______ square feet of retail space; commercial offices, buildings, or complexes in excess of ______ square feet of office space; hospitals and other major medical centers; sports complexes and regional recreational facilities; housing developments (whether single or multi-family) in excess of ______ dwelling units; any land development that will require in excess of ______ parking spaces pursuant to the subdivision and land development ordinance; and, any development that will affect in excess of __ acres or generate new vehicle trips in excess of _____ trips per day, or that will overburden the existing road network.] The term shall also include any development within ___ feet of a municipal boundary and developments that will require the construction of new municipal sewage facilities.

[Note: Pursuant to Section 301 (a)(7)(ii) of the MPC, each county comprehensive plan is required to identify “current and proposed land uses which have a regional impact and significance.” The regional impact analysis of any given Committee may choose to incorporate the county list if it is appropriate, or to supplement the county list with additional types of development that the Committee determines have the potential to impact the region covered by the Plan.]

(b) Procedure.

When a proposal, plan, or submission concerning a development of regional significance and impact is submitted to one or more Participants, the Participant shall provide the secretary of the Committee with a copy of the submission, as well as a written notice identifying the location of the project and the material facts concerning the project, within 10 days after it is submitted to the Participant(s). When the development of regional significance is a permitted use in the area where it is proposed for construction, and when the plans for the development conform in all material respects to all other land development ordinances, and when the development will not require the installation of additional publicly funded infrastructure, and when the ordinances and regulations of the host municipality are generally consistent with the Plan, the role of the Committee and other Participants shall be limited to providing comments on the proposal to the host municipality. If the proposal does not satisfy all of the foregoing requirements, and the project, if constructed as presented, is determined by the Committee to be not generally consistent with the Plan, then, upon receipt of an opinion from the Committee that the project is not generally consistent with the Plan the governing body of the municipality shall reject the pro-
ject if legally permissible. If it is not legally possible to reject the project, the host municipality agrees to take all measures legally available to it to limit or modify the project if necessary, so that it conforms to the Plan (or minimizes the inconsistency with the Plan) to the greatest degree possible. In each instance, the Committee and any Participant shall have the right to submit comments, recommendations, or proposed amendments to the governing body of the host municipality. The Committee and any Participant shall have the right to appear and comment before the body that is considering any action with respect to a development of regional significance. If the proposal is inconsistent with the comprehensive plan or necessitates a change in zoning, the host municipality will follow the procedure for amending comprehensive plans prior to changing the zoning or other ordinance.


Section ___ of the Plan identifies specific land use allocations in ___ of the Participating Municipalities. In each area where a specific land use is encouraged or prohibited by the Plan, the affected Participant will adopt the necessary ordinances to implement the plan, as follows:

[Here, list the municipality, the specific land use allocation, and as specific a description of what is expected of that municipality as possible.

Some fanciful examples:

- The north west quadrant of Upper Rosebud Township is identified in the Plan as a rural resource area where no significant expenditures of public funds for infrastructure development are planned during the 20 year projection of the Plan (and beyond). In order to preserve the rural resources of the area, there will be no industrial, commercial, multifamily residential, or single family residential development permitted, with the limited exception of single lot residential development along the existing road network on large lots of at least ___ acres. Upper Rosebud will adopt ordinances that prohibit the dedication of new streets and roads in this area and that prohibit additional development of private lanes, streets or roads, except in limited circumstances. In order to preserve the rural character of the township, the area adjacent to exit ___ on route ____ shall not be zoned for commercial or industrial use.

- The area of Boomtown Township surrounding Old Quaint Borough is identified in the Plan as a growth area where more intense residential and commercial development is planned and will be fostered. Boomtown will increase the residential density in the area surrounding the borough to a minimum of 10 dwelling units per acre, require all new subdivisions to integrate their streets into the Old Quaint street grid, and permit mixed commercial and non-hazardous industrial uses in the area to extend and compliment the remaining traditional town, mixed uses that survive within the Borough. Mobile home parks are not considered consistent with the extension of traditional town development intended for this area and shall not be permitted.
The Plan provides that the portions of X, Y, and Z Townships that border the interstate shall be developed in a fashion that takes advantage of the access provided by the highway without destroying the character of the neighborhood by clogging the intersecting roads with an interchange based blob of pod commercial establishments. These townships agree to develop a capital facilities plan that includes the construction of a parallel service road along the Interstate from exit ____ to exit ____ and also provides for the extension of sewer and water facilities along the service road. The townships shall restrict commercial development fronting on the intersecting roads and shall foster development along the feeder road network.

Examples are endless—but specifics should be spelled out whenever possible

[As an alternative to site specific Plan provisions and explicitly stated implementation requirements, the following language could be used to satisfy the statutory requirement of Section 1104 that the Implementation Agreement provide for general consistency with specific multimunicipal plan requirements.]


(Alternate)

(a) Each Participant agrees to fully perform and implement all responsibilities assigned to it in the XYZ Multimunicipal Plan as set forth on Schedule __, attached hereto.

(b) Each Participant agrees to fully perform and implement all other duties and responsibilities it is required to perform, either singularly or in conjunction with other Participants, in connection with implementation of the XYZ Multimunicipal Plan, including those responsibilities with respect to any of the areas designated by the XYZ Multimunicipal Plan as growth areas, future growth areas, and rural resource areas in accordance with Article XI of the MPC.

5. Procedure Upon Amendment of the Plan.

If the Participants approve an amendment to the XYZ Multimunicipal Plan, the Committee shall review the Plan as amended, the zoning, subdivision, and other land development ordinances and regulations of each Participant to determine if amendments to the ordinances and regulations of any Participant are required to achieve general consistency between the Plan as amended and the ordinances and regulations of the Participants. The Committee shall thereafter make recommendations to the governing body of each Participant concerning proposed amendments to its land development ordinances and regulations to implement the amended Plan. If requested, the Committee will assist the Participants in conforming their land development ordinances to the Plan as amended.

In conjunction with each comprehensive review and amendment of the Plan, but no less frequently than every ten years, the Committee shall evaluate the operation, application, and development within each designated growth, future growth, and rural resource area designated by the Plan. The purpose of this review is to determine if it is necessary to redefine those areas to achieve the goals and objectives of the Plan. In conducting this review the Committee shall review the assumptions that went into the initial designation of the areas and assess the development or other activities that have actually occurred within the designated areas. The Committee shall determine the extent to which the designated areas have functioned as anticipated at the time they were created. The Committee shall review the extent to which the population growth projections, projected housing demand, and other assumptions that supported the designation of the areas have been fulfilled. The review shall also determine the extent to which the infrastructure planned for growth areas has been developed, or, if undeveloped, is planned for future development. The review shall also examine the capital improvement plans required to develop needed infrastructure or otherwise implement the Plan. If this review indicates a need for changes in designated growth, future growth, or rural resource areas, or other amendments to the land development ordinances and regulations of the Participants to improve the functioning of the designated areas, the Committee shall recommend changes to the Participants.


Each Participant agrees that within two years of the passage of its ordinance adopting a Plan Amendment it will conform its zoning, subdivision, and other land development ordinances and regulations to the Plan as amended.

7. Dispute Resolution.

A dispute or claim over the rights or obligations, performance, breach, termination, or interpretation of this Implementation Agreement, the Plan or any other matter, action, claim, dispute, question, or issue arising under the terms of this Agreement not otherwise resolved between or among Participants, and/or one or more Participants and the Committee may be resolved as follows:
(a) The disputing parties agree to first discuss and negotiate in good faith in an attempt to resolve the dispute amicably and informally.

(b) If the dispute cannot be settled through direct discussions and good faith negotiations, the disputing parties agree that, upon written notice by one of the disputing parties to the other or others, they will endeavor to settle the dispute in an amicable manner by mediation utilizing the auspices of the County pursuant to the provisions of Section 1104(d) of the MPC, the American Arbitration Association, or such other mediation agency as the parties may agree. Unless otherwise agreed, costs of mediation will be shared equally by the disputing parties.

(c) The Participants mutually covenant to make best efforts to resolve disputes as they arise.

8. Enforcement.
This Agreement may be enforced against any Participant by any other Participant in accordance with Section 2315 of the Intergovernmental Cooperation Act, 53 Pa. C.S.A. § 2315.

9. Reports.
By March 1st in each year following the execution of this Implementation Agreement, each Participant will furnish the county planning agency, and the county planning agency will furnish the Committee, with a report that describes the activities carried out pursuant to this Implementation Agreement during the previous year. In addition to a description of the Participant’s activities pursuant to this Implementation Agreement, the report shall include summaries of public infrastructure needs in growth areas and progress toward meeting those needs through capital improvement plans and implementing actions, and reports on development applications and dispositions for residential, commercial, and industrial development. The report shall be in sufficient detail to enable the evaluation of the extent all categories of use and housing for all income levels are being provided within the area of the Plan. The Committee may assist the Participants in preparing their annual report and is authorized to compile and consolidate the information contained in the Participants’ annual reports into a single, comprehensive, and detailed report, a copy of which will be provided to each Participant and the planning agency of the county.
10. Amendment.
   (a) Requirements.

   An amendment to this Implementation Agreement that implements an amendment to the Plan shall be approved by the written consent of ____ (number or percent to be agreed upon by participants) of the Participants. An amendment to this Implementation Agreement that affects the rights and obligations of all Participants may be made only with the consent of all Participants, each of which shall execute the amendment.

   (b) Consistency with the XYZ Multimunicipal Plan.

   No amendment to this Implementation Agreement shall be inconsistent with the XYZ Multimunicipal Plan. Any amendment that is not generally consistent with the XYZ Multimunicipal Plan shall be void.

   (c) Notice of Amendment.

   A true and complete copy of every amendment of this Implementation Agreement shall be provided to each Participant within 10 days of the full execution thereof or its effective date, whichever is sooner.

11. New Participants to this Implementation Agreement.

   Additional Participants may join this Implementation Agreement. A new Participant must first be admitted as an Additional Participant to the Committee under the terms of the Planning Agreement and execute the Planning Agreement. If a new Participant’s joinder will require an amendment to the XYZ Multimunicipal Plan, the new Participant may join the Implementation Agreement when (i) the Participants have approved an appropriate Plan Amendment providing for the admission of the Additional Participant and (ii) the Additional Participant has adopted the XYZ Multimunicipal Plan as so amended and has agreed to execute and be bound by this Implementation Agreement.

12. Withdrawal.

   A Participant may voluntarily withdraw from participation in this Implementation Agreement at any time after having been a Participant for at least one year; provided that the Participant shall give at least six months notice to the Committee secretary and to each other Participant. Any Participant who withdraws from the Planning Agreement shall be automatically withdrawn from this Implementation Agreement.
13. Supplement to Planning Agreement.

This Implementation Agreement is a supplement to the Planning Agreement. The Planning Agreement is unaffected by this Implementation Agreement. To the greatest degree possible the two agreements shall be read and interpreted consistently as one.

14. Execution, Effective Date, and Term.

This Implementation Agreement shall become effective upon the adoption of an ordinance approving this Implementation Agreement by all Participants. In the event less than all Participants adopt an approving Ordinance, this Implementation Agreement shall be deemed automatically amended to name only those Participants whose governing bodies have passed an approving Ordinance. Thereafter steps shall be taken to also amend the Plan and the Planning Agreement to reflect only those Participants who have adopted this Agreement. This Agreement shall remain in effect until terminated by written consent of 75% (number or percent to be agreed upon by participants) of the Participants.

15. Miscellaneous.

(a) Assignment.

This Implementation Agreement may not be assigned by any Participant. The Committee may delegate or assign its duties but not its responsibilities hereunder in accordance with policies and procedures adopted by the Committee to consultants, advisors, experts, or other persons as determined appropriate by the Committee, including a sub-committee or executive director, if one is employed by the Committee.

(b) Severability.

The unenforceability or invalidity of any provision of this Agreement shall not affect the enforceability or validity of any other provision.

(c) Counterparts.

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one instrument.

(d) Expenses.

Each Participant shall pay all costs and expenses incurred or to be incurred by it in negotiating and preparing this Agreement, and in carrying out the transactions contemplated by this Agreement to be performed on the part of the Participant. The expenses of the Committee shall be defrayed through
grants and assessments as set forth in the Planning Agreement and as agreed to from time to time by the Participants.

(e) Governing Law.
This Agreement shall be construed and governed in accordance with the laws of the Commonwealth of Pennsylvania.

(f) Headings.
The subject or section headings in this Agreement are included for the convenience of the reader and shall not affect the construction or interpretation of any of its provisions.

IN WITNESS WHEREOF, the Participants intending to be legally bound hereby, have caused this Agreement to be executed as of the date set forth opposite the name of each Participant.

ATTEST:

[Signature]
Secretary
Date:

ATTEST:

[Signature]
Secretary
Date:
THE INDIAN VALLEY INTERGOVERNMENTAL COOPERATIVE IMPLEMENTATION AGREEMENT

For the Municipalities of:
Souderton, Telford, Franconia, Lower Salford, Salford, and Upper Salford

DRAFT
July 1, 2002

SECTION I: AUTHORIZATION
The following Intergovernmental Cooperative Implementation Agreement is authorized by, and conforms to, Article III and Article XI of the Pennsylvania Municipalities Planning Code, Act 247, fourteenth edition of August 2000, and the Intergovernmental Cooperation Act, 53 Pa C.S.A..

SECTION II: PURPOSE
The Indian Valley is a unified and identifiable region with rolling hills, scenic vistas, meandering streams, historic boroughs and villages, and charming rural character. These features combine to form a unique region with a high quality of life. The goal of the six Indian Valley municipalities is to preserve and protect this quality of life. To further this aim, the Indian Valley Regional Comprehensive Plan has designated “Rural Resource Areas” and “Growth Areas”. In rural resource areas new residential development will be limited and required to preserve and protect the rural landscape to the greatest extent possible under the law. New residential development will be directed to designated growth areas where the necessary infrastructure is in place, or planned, to support it. Most non-residential uses will be directed to designated growth areas and established concentrations of industrial uses, while commercial forms of non-residential development will be permitted on a limited basis within established towns and villages.
It is the desire of the Indian Valley to encourage responsible development that respects the Valley’s sensitive environmental features and special rural character, enhances the historical quality of the boroughs and villages, efficiently uses public infrastructure, and strengthens the regional tax base by creating new employment opportunities. Through regional cooperation and planning the Indian Valley intends to:

- Protect the unique historic, cultural and natural features of the region.
- Accommodate the needs of the existing and future residents of the Indian Valley.
- Implement effective growth management techniques to provide for orderly and well planned development.
- Encourage a range of housing options.
- Encourage new high quality jobs.
- Support new recreation opportunities.
- Protect the natural resources of the Indian Valley.
- Direct infrastructure improvements to designated growth areas.
- Address the specific needs and unique conditions of each municipality.

SECTION III: GOALS & OBJECTIVES
The following goals and objectives, which can also be found in the adopted Indian Valley Regional Comprehensive Plan, will help guide and shape new growth and development in the Valley for the next twenty years.

HOUSING GOAL
The Indian Valley Plan intends to accommodate adequate housing opportunities for current and future residents.

Objectives:
- Concentrate new development in designated growth areas.
- Encourage new housing developments that create a sense of community and promote a pedestrian friendly environment.
- Meet fair-share requirements as a region.
- Encourage housing opportunities for a range of income levels.

COMMERCIAL/RETAIL GOAL
The Indian Valley Plan intends to encourage economic vitality while meeting the current and future commercial and retail needs of the Indian Valley.
OBJECTIVES:
♦ Serve the local shopping needs of the Indian Valley.
♦ Preserve, protect and enhance existing commercial areas in the boroughs and townships.
♦ Limit the amount of new commercial and retail development outside of established areas.

OFFICE GOAL
The Indian Valley Plan intends to encourage office and administrative center development in appropriately zoned districts.

Objectives:
♦ Enhance the tax base within the region.
♦ Provide employment opportunities for residents of the Indian Valley.
♦ Provide office space that meets the needs of a range of users.
♦ Encourage high quality office and administrative center development within appropriate areas in coordination with infrastructure improvements.

INDUSTRIAL/LIGHT MANUFACTURING GOAL
The Indian Valley Plan intends to encourage industrial development in established industrial areas.

Objectives:
♦ Enhance the tax base within the region.
♦ Provide employment opportunities for residents of the Indian Valley.
♦ Encourage new industrial, light manufacturing and research lab uses in designated areas.
♦ Promote clean and environmentally friendly industrial / light manufacturing uses.

PARKS AND RECREATION GOAL
The Indian Valley Plan intends to encourage sufficient recreational opportunities to meet the needs of present and future residents.

Objectives:
♦ Coordinate park and recreational opportunities among the six Indian Valley municipalities.
♦ Continue to implement the park and recreation goals of the municipal Open Space plans.
♦ Coordinate planned trail connections between open space and recreational areas.
♦ Develop active and passive recreational opportunities within the region.
OPEN SPACE GOAL
The Indian Valley Plan intends to preserve and protect open space for present and future residents.

Objectives:
- Actively pursue resources to preserve open space in the region.
- Continue to implement the goals of the municipal Open Space plans.

NATURAL RESOURCE PROTECTION GOAL
The Indian Valley Plan intends to preserve and protect natural resources for present and future residents.

Objectives:
- Protect existing groundwater resources.
- Preserve and protect environmentally sensitive areas and natural resources including woodlands, stream valleys, wetlands, floodplains, watersheds, groundwater recharge areas, steep slopes, scenic vistas, vegetation, and wildlife.
- Protect all municipalities within the same watershed from impacts of improper development.
- Continue to implement the natural resources goals of the municipal Open Space plans.

AGRICULTURE GOAL
The Indian Valley Plan intends to encourage and support the preservation of agriculture as a viable industry.

Objectives:
- Encourage permanent preservation through participation in County and State agricultural programs.
- Limit new development in designated agricultural areas.

TRANSPORTATION GOAL
The Indian Valley Plan intends to promote a safe and efficient transportation system throughout the region.
Objectives:
♦ Identify problematic traffic areas and develop mitigation strategies.
♦ Encourage sidewalks in new development where appropriate.
♦ Develop a local and regional trail network.
♦ Explore mass transit options.
♦ Consider centralized and shared parking facilities in established and new commercial areas.

COMMUNITY FACILITIES GOAL
The Indian Valley Plan intends to address the needs of current and future residents regarding public sewer and water systems, emergency services, schools, and library facilities.

Objectives:
♦ Encourage the sharing of municipal services / facilities.
♦ Use public sewer and water systems efficiently by extending these systems only within designated growth areas.
♦ Protect surface water quality and ensure sufficient water supply by using public and private sewer and water systems, including on-site systems, effectively.
♦ Support existing emergency services and extend and improve their capacities to serve a growing population.
♦ Cooperate with the school district and public library to encourage appropriate locations of new or expanded facilities.

SECTION IV: DEFINITIONS
General Consistency – That which exhibits agreement or correspondence between matters being compared which denotes a reasonable rational, similar, connection or relationship.

Indian Valley Regional Planning Commission – An advisory body, comprised of members appointed by the six Indian Valley municipalities, charged with the development and maintenance of the Indian Valley Regional Comprehensive Plan and the administration and interpretation of said Plan on all matters relating to zoning, land use, and public infrastructure and services.
Subdivision and Land Development of Regional Impact shall be defined as:

1) Any residential land development or subdivision that results in the creation of 40 lots or more, or results in the development of 50 units or more, shall be considered a subdivision or land development of regional impact.

2) Any non-residential land development of 50,000 square feet or more for retail, office, industrial, or other non-residential proposal shall be considered land developments of regional impact.

3) Any residential or non-residential land development or subdivision proposing any of the following:
   a. The use of an existing sewage treatment facility located outside the municipality in which the subdivision or land development is proposed.
   b. The extension of water supply facilities across municipal boundaries.
   c. The construction of a sewage facility, whether publicly or privately owned, for the collection of sewage from two or more lots.

SECTION V: INDIAN VALLEY REGIONAL COMPREHENSIVE PLAN

1. Plan Adoption: The adopted Indian Valley Regional Comprehensive Plan shall serve as the guide for all future growth in the Valley. Upon its adoption by all the participating municipalities, the individual municipal comprehensive plans shall become null and void, and from that date forward each municipality’s land use planning decisions shall be guided by the Regional Plan and conform to its goals and objectives.

2. Comprehensive Plan Compliance: Within 2 years from the date of its adoption, the municipalities of the Indian Valley shall bring their individual zoning codes and subdivision and land development ordinances into general consistency with the Indian Valley Regional Comprehensive Plan’s goals, objectives, and policies. The participating municipalities further agree to adhere to the principles of the Plan when rendering decisions and making policy.

3. Plan Interpretation: Member municipalities agree to duly consider the opinions and recommendations made by the Regional Planning Commission on all matters pertaining to the interpretation of the Indian Valley Regional Comprehensive Plan, but it is understood that any opinion or recommendation rendered by the Regional Planning Commission shall be advisory only.

SECTION VI: CONTINUATION OF THE INDIAN VALLEY REGIONAL PLANNING COMMISSION
In continuation of the previously established Indian Valley Regional Planning Commission, the organization, powers, duties, and responsibilities of the Indian Valley Regional Planning Commission are as follows:

1. **Membership**:

   a. The Regional Planning Commission shall be comprised of two representatives from each municipality. One member from each municipality shall be a representative of the governing body, and the other may either be from the governing body, planning commission, or citizen from the municipality.

   b. Each municipality shall have the right to send a proxy to any meeting of the Commission where said proxy shall have the right to cast the municipal vote on matters which come before the Commission.

   c. Each municipality is responsible for ensuring full representation on the Commission and must fill any vacancy if that vacancy occurs otherwise than by expiration of term, in a timely fashion.

2. **Officers**: The positions of Chairperson, Vice-Chairperson, Secretary, and Treasurer shall be held by individuals representing three different municipalities.

3. **Terms of Office**: Officers shall serve a one-year term, and may succeed themselves for a second one-year term provided that at the end of two years the position shall be filled by an individual representing a different municipality.

4. **Quorum**: A quorum shall be considered achieved when there are four (4) voting members present whereby each voting member represents a separate municipality.

5. **Voting Rights**: Although each municipality shall have two (2) representatives on the Commission, together they shall have one (1) vote to cast on all matters that come before the Regional Planning Commission that requires action. The governing body of each municipality shall designate which representative shall have the prevailing vote. If the representative designated with the prevailing vote is not present, the vote of the attending representative shall be considered the prevailing vote.

6. **Voting**: As the Regional Planning Commission is an advisory body, any and all action taken by the Commission shall be by simple majority vote except as otherwise noted in this document.
a. No action may be taken, or recommendation made, where the resulting vote ends in a tie.

7. Meetings:

a. Regular meetings will be held monthly on a mutually agreed upon day and time. In the event of conflict with holidays or other events, a majority at any meeting may change the date of said meeting. Should there be no business to be considered, the Chairman may cancel a meeting with concurrence from at least three other participating municipalities, provided the meeting is not cancelled more than 10 days prior to the meeting date.

b. All meetings or portions of meeting at which official action is taken shall be open to the general public.

8. Administration and Expenditure of Funds:

a. Individual municipalities may appropriate funds, at the discretion of each individual Governing Body, for use by the Regional Planning Commission.

b. Within the limits imposed upon it by the funds available for its use, the Regional Planning Commission may appropriate funds for the operation of the commission and prepare an annual budget for disbursement of such funds. The process for appropriating funds and developing an annual budget shall be specified within the by-laws of the Regional Planning Commission.

c. All budgeted and non-budgeted items shall be approved by unanimous consent of the voting members of the Regional Planning Commission.

d. Within the limits imposed upon it by the funds available for its use, the Regional Planning Commission may employ such staff or personnel and enter into contracts with consultants as it sees fit to aid in its work.

e. The Regional Planning Commission may also seek federal, state and county grants to offset the cost of operation and to hire staff, or professional consultants, as deemed necessary.

9. Annual Report: Each year the Regional Planning Commission shall prepare an annual report detailing the progress made toward implementing the goals and objectives of the Indian Valley Regional Comprehensive Plan. The Regional Planning Commission shall also prepare a synopsis of the subdivisions and land developments reviewed that have been classified of “regional significance”. A copy
of the annual report shall be sent to each of the participating municipalities and to the Montgomery County Planning Commission.

10. **Withdrawal:** A municipality may withdraw from the regional planning organization consistent with the following sequential process:

   a. Written notice is provided to the Regional Planning Commission and each other member municipality regarding the intention to withdraw.

   b. The withdrawing municipality holds a public hearing, pursuant to public notice, to solicit comment regarding its intention to withdraw.

   c. The governing body of the municipality intending to withdraw passes a resolution authorizing the withdrawal.

   d. The withdrawal shall be effective six months from the adoption of the resolution authorizing the withdrawal. The six-month waiting period will allow for the Regional Comprehensive Plan to be revised as necessary.

   a. Any municipality authorizing withdrawal from the Regional Planning Commission shall be bound by the requirements of this agreement, including compliance with all subdivision and land development, zoning and comprehensive plan amendment review processes, even during the six-month waiting period, except as may be permitted herein.

11. **Extended Financial Responsibility:** Any municipality which has exercised its right to withdraw from the regional planning organization shall be financially responsible, even after withdrawal, for only those budgeted and non-budgeted items which it, or its representative to the Regional Planning Commission had agreed to or voted for, for a period of six months after the effective date of withdrawal.

**SECTION VII: SUBDIVISION AND LAND DEVELOPMENT REVIEW PROCESS**

1. **Subdivision, Land Development Review Role:** All subdivision and or land development, classified by this document as having regional significance, shall be brought before the Regional Planning Commission for review and comment.

   a. A land development not classified as having regional significance may be brought before the Regional Planning Commission for review and comment when requested by the member municipality in which the subdivision or land development is occurring. Requests for review may
be made by notifying the Chairman or Secretary not less then 14 days prior to a regularly scheduled meeting.

2. **Submittal and Review Process:** It shall be the responsibility of the individual municipality [and not that of the developer] to forward on to the Regional Planning Commission for review and comment any preliminary land development or subdivision proposal that is to be reviewed by the Commission.

   a. All preliminary plans shall be submitted to the Regional Planning Commission in sufficient time to allow for review and comment within the time-frame specified by the Municipalities Planning Code, Act 247.

   b. In their review of said subdivision or land development, the Regional Planning Commission shall consider the merits of the proposal as it relates to the stated goals, objectives and policies of the adopted Indian Valley Regional Comprehensive Plan. Specific design details will be the responsibility of the municipality in which the subdivision or land development is proposed and other professional reviews conducted on behalf of the municipality.

   c. In their review of said preliminary subdivision or land development proposal, the Regional Planning Commission shall rely upon the professional reviews written for the municipality as part of the standard municipal review process.

   d. No additional reviews or studies shall be required of the applicant, or of the municipality, by Regional Planning Commission. The municipality, however, shall retain the right to request additional reviews or studies as deemed necessary and appropriate.

   e. Review comments are advisory only and shall be directed to the Manager or Secretary of the municipality submitting the preliminary plans for distribution to the appropriate Boards, consistent with the municipality’s review process. Review comments submitted by the Regional Planning Commission shall be maintained within the municipal file tracking the proposed subdivision or land development.

**SECTION VIII: ORDINANCE AND CONSISTENCY REVIEW PROCESS**

All proposed subdivision and land development and zoning text amendments or zoning map changes shall be sent to the Regional Planning Commission for review and comment in compliance with the following process:
1. **Submittal Process**: Each municipality shall forward to the Regional Planning Commission all proposed zoning text amendments or zoning map amendments that affect a change on existing use and density standards for consistency review and comment. Amendments to ordinances other than zoning, or zoning text amendments or zoning map amendments that do not affect use or density (i.e. dimensional requirements, design standards, etc.) are not required to be submitted. Submissions shall be made to the Regional Planning Commission prior to any public hearing, or advertisement of such, regarding the proposed ordinance amendments or zoning map changes.

2. **Consistency Determination and Review**: Following the submission of any proposed zoning ordinance or map amendment, the Regional Planning Commission shall determine if the submission is generally consistent with the stated goals, objectives, and policies of the Indian Valley Regional Comprehensive Plan. As with all other action taken by the Regional Planning Commission, opinions rendered on the matter of general consistency shall be done by simple majority vote.

   a. The consistency determination shall include the identification of any fair share requirements that may be compromised by the proposed zoning ordinance or map amendment.

   b. Where the Regional Planning Commission has determined the proposed zoning ordinance or map amendment is generally consistent with the Regional Comprehensive Plan and does not compromise any fair share issues, written notice shall be provided to the Manager or Secretary of the municipality submitting the proposal so that the municipality may proceed with adoption of the proposed zoning ordinance or map amendment.

   i. As part of the consistency notification, the Regional Planning Commission may submit additional review comments regarding the proposal. These additional review comments are advisory only and shall be directed to the Manager or Secretary of the municipality proposing the ordinance change or map amendment for distribution to the appropriate Boards, consistent with the municipality’s review process.

   c. Where the Regional Planning Commission has determined the proposed zoning ordinance or map amendment is not generally consistent with the Regional Comprehensive Plan, the Regional Planning Commission shall notify the Manager or Secretary of the municipality submitting the proposal. The notice shall be in writing and include the following:
i. A statement of the identified inconsistency(ies) and an indication of what change could be made to the proposal to eliminate the conflict.

ii. An indication of whether or not the proposed zoning ordinance or map amendment will compromise the fair share requirements of the region.

Upon receipt of notification, the municipality submitting the proposal may either modify the proposed zoning ordinance or map amendment to eliminate the inconsistency(ies) and/or fair share issue and resubmit the proposal consistent with Section VIII.2, above, or initiate a request to amend the Comprehensive Plan in accordance with Section IX.2. or IX.3.

SECTION IX: COMPREHENSIVE PLAN AMENDMENT AND UPDATE PROCESS

It is the responsibility of the Regional Planning Commission to update, revise, and prepare amendments to the Indian Valley Regional Comprehensive Plan consistent with the following:

1. **Comprehensive Plan Update**: At a minimum the Regional Planning Commission shall undertake to update the Indian Valley Regional Comprehensive Plan every 10 years from the date of its initial adoption. The update process shall include an analysis of the designated growth area, future growth area, and rural resource area to determine if it is necessary to redefine these areas to achieve the goals and objectives of the plan.

2. **Requests for Comprehensive Plan Amendment**: A request to amend the Regional Comprehensive Plan may be made by a participating municipality at any time, consistent with the following:
   a. Requests for a Comprehensive Plan amendment shall include a summary of the change requested, and the supporting rationale for the proposed change. Comprehensive Plan amendments proposed to permit the adoption of an ordinance amendment or zoning map changes shall include copies of the proposed ordinance or zoning map.
   b. Consistent with the request of the participating municipality, the Regional Planning Commission shall prepare an amendment to the Comprehensive Plan.
   c. Following the preparation of a Comprehensive Plan amendment, the Regional Planning Commission shall forward the proposal to each participating municipality for consideration. The proposal shall be forwarded with a recommendation of the Regional Planning Commission, in-
cluding an indication of whether or not the proposed zoning ordinance or map amendment will compromise the fair share requirements of the region, based upon a roll call vote.

d. At a minimum, the governing bodies of each participating municipality shall hold a public hearing, pursuant to Section 302 of the Pennsylvania Municipalities Planning Code, Act 247, latest edition, to consider all Comprehensive Plan amendments prepared by the Regional Planning Commission, should any be pending, at their regularly scheduled meeting in May and November of each year.

i. Also pursuant to Section 302 of the Pennsylvania Municipalities Planning Code, Act 247, latest edition, the municipal planning commission of each participating municipality shall hold a public meeting to consider all Comprehensive Plan amendments prepared by the Regional Planning Commission, should any be pending, at their regularly scheduled meeting in April and October of each year.

ii. Beyond considering Comprehensive Plan amendments at the predetermined meetings outlined above, municipalities may consider Comprehensive Plan amendments at any time.

e. Each of the five municipalities not requesting the Comprehensive Plan amendment shall pass a resolution approving or denying the proposed amendment within 45 days governing bodies public hearing.

f. The municipality proposing the Comprehensive Plan amendment shall not pass a resolution approving the Comprehensive Plan amendment until all other participating municipalities have approved the amendment, except as provided for in Section IX.2.g, below.

Following approval of the Comprehensive Plan amendment by all other participating municipalities, the municipality proposing the amendment may adopt any zoning ordinance or map amendments necessary to implement the Comprehensive Plan amendment, provided that general consistency shall be achieved with the Indian Valley Regional Comprehensive Plan’s goals, objectives, and policies within two years of the Comprehensive Plan amendment adoption date.

f. Should any participating municipality deny the proposed Comprehensive Plan amendment, the municipality proposing the amendment may not proceed with the adoption of the proposed zoning ordinance or map amendment, except that:

i. If the proposed Comprehensive Plan amendment has been denied by only one or two participating municipalities, Dispute Resolution, as identified in Section XIII, shall be exer-
cised for at least 30 days in an attempt to resolve the conflict. Although dispute resolution can be exercised at any time and for any time period mutually agreed upon by the participating municipalities.

ii. Following the dispute resolution process, if required, proposed zoning ordinance or map amendments that are determined not to compromise the fair share requirements of the region may only be adopted by the municipality initiating the emergency request following approval of a resolution authorizing withdrawal from the Regional Planning Commission, in compliance with Section VI.10.

iii. Following the dispute resolution process, if required, proposed zoning ordinance or map amendments that are determined to compromise the fair share requirements of the region shall not be adopted by the municipality initiating the emergency request until the municipality has effectively withdrawn in compliance with Section VI.10.

h. To be in effect, any and all amendments to the Plan must be unanimously approved by resolution by all participating municipalities subsequent to the Comprehensive Plan Amendment requirements of Section 302 of the Pennsylvania Municipalities Planning Code, Act 247, latest edition.

3. Emergency Requests for Comprehensive Plan Amendment: When a participating municipality has determined the need for a time-sensitive zoning ordinance or map amendment, an emergency request to amend the Regional Comprehensive Plan may be made consistent with the following:

a. The participating municipality shall submit the proposed Comprehensive Plan amendment to the Regional Planning Commission, including all map and/or text changes that would be required, at least 14 days prior to the next regularly scheduled meeting of the Regional Planning Commission. Within 30 days the regional planning commission shall review the proposed Comprehensive Plan Amendment and forward it to each participating municipality for consideration. The proposed amendment shall be forwarded with an indication of whether or not the proposed zoning ordinance or map amendment will compromise the fair share requirements of the region.

b. Within 60 days of receiving the proposed Comprehensive Plan amendment, each participating municipality shall hold a public meeting of the local planning commission and a public hearing of the governing body, pursuant to Section 302 of the Pennsylvania Municipalities Planning Code, Act 247, latest edition.
c. Each of the five municipalities not requesting the Comprehensive Plan amendment shall pass a resolution approving or denying the proposed amendment within 90 days of receiving the proposed Comprehensive Plan amendment.

d. The municipality proposing the Comprehensive Plan amendment shall not pass a resolution approving the Comprehensive Plan amendment until the amendment has been approved by all other participating municipalities, except as provided for in Section IX.3.e, below.

Following approval of the Comprehensive Plan amendment by all other participating municipalities, the municipality proposing the amendment may act upon the proposed zoning ordinance or map amendment precipitating the Comprehensive Plan amendment.

e. Should any participating municipality deny the proposed Comprehensive Plan amendment, the municipality proposing the amendment may not proceed with the adoption of the proposed zoning ordinance or map amendment, except that:

   i. If the proposed Comprehensive Plan amendment has been denied by only one or two participating municipalities, Dispute Resolution, as identified in Section XIII, shall be exercised for at least 30 days in an attempt to resolve the conflict. Although dispute resolution can be exercised at any time and for any time period mutually agreed upon by the participating municipalities.

   ii. Following the dispute resolution process, if required, proposed zoning ordinance or map amendments that are determined not to compromise the fair share requirements of the region may only be adopted by the municipality initiating the emergency request following approval of a resolution authorizing withdrawal from the Regional Planning Commission, in compliance with Section VI.10.

   iii. Following the dispute resolution process, if required, proposed zoning ordinance or map amendments that are determined to compromise the fair share requirements of the region shall not be adopted by the municipality initiating the emergency request until the municipality has effectively withdrawn in compliance with Section VI.10.

f. To be in effect, any and all amendments to the Plan must be unanimously approved by resolution by all participating municipalities subsequent to the Comprehensive Plan Amendment requirements of Section 302 of the Pennsylvania Municipalities Planning Code, Act 247, latest edition.

SECTION X: MUNICIPAL PLANNING COMMISSIONS
Each of the Indian Valley municipalities shall retain their own municipal planning commission. Each local planning commission will review those subdivisions and land developments that are proposed within their own municipality, and then provide advisory comment to their elected officials.

SECTION XI: MUNICIPAL ZONING HEARING BOARDS
Each municipality shall retain its individual zoning hearing board whose function is to interpret the municipal zoning ordinance and to grant variances or special exceptions when appropriate.

SECTION XII: MUNICIPAL ZONING
Each municipality shall retain and administer its own individual zoning code and zoning map. Any municipality may revise its zoning map or amend its zoning code unilaterally provided said change is consistent with the goals, objectives, and policies of the adopted Indian Valley Regional Comprehensive Plan. All proposed zoning text or map amendments that affect a change on existing use and density standards, however, must be submitted to the Indian Valley Regional Planning Commission for a consistency determination.

Any proposed zoning text or map amendment that is not generally consistent with the Indian Valley Regional Comprehensive Plan, as determined by the Regional Planning Commission, may only occur following a corresponding amendment to the Plan, consistent with Section IX, herein.

Any zoning changes made during the course of a municipality’s withdrawal shall not invalidate any segment of the Comprehensive Plan, provided that all aspects of the withdrawal and zoning change were done in compliance with this agreement.

SECTION XIII: DISPUTE RESOLUTION
In instances where a dispute arises between two or more municipalities as to the interpretation of the Indian Valley Regional Comprehensive Plan, or over proposed amendments to the Plan, the Indian Valley Regional Planning Commission shall mediate said dispute. The Regional Planning Commission may retain the services of the Montgomery County Planning Commission, or any other entity organization that specializes in mediation.

SECTION XIV: ENFORCEMENT
This agreement may be enforced against any participant by any other participant in accordance with Section 2315 of the Intergovernmental Cooperation Act, 53 Pa C.S.A. §2315.
Appendix 6A-3: APA Consistency Review Process

The following informative summary of consistency review legislative provisions, case law, and planning practice across the country was assembled by Stuart Meck over a number of years for APA’s Growing Smart™ Legislative Guidebook, which is now published in a 2002 edition. It includes recommendations for legislative provisions dealing with the process of determining whether implementing ordinances are consistent with the comprehensive plan.

Pennsylvania’s MPC now requires that ordinances shall implement the comprehensive plan and that local and county plans shall be generally consistent; however, the statute does not spell out a process or standards for determining whether plans and ordinances are generally consistent. Article XI gives cooperating municipalities the authority to provide for consistency review through their planning and implementation agreements.

In the case of multi-municipal comprehensive plans, a consistency review and determination will be of utmost importance because the parties, state agencies, and the courts will look to implementation through the generally consistent ordinances of each participating municipality in addressing funding and permitting issues and in considering legal challenges to the validity of particular ordinance provisions. Municipalities cooperating in a multi-municipal plan could choose to adapt the APA recommendations to the consistency review process that is required in their implementation agreements under 1104(b)(1). For example, in place of “the local planning agency” suggested in the APA’s provisions, the agreements could designate the planning committee or a specific consistency review committee to conduct a review process like that set forth in APA’s paragraphs (2)–(6) on pages 6A-33 and 6A-34, for the purpose of determining whether there is general consistency between any proposed land use action (as defined in APA 8-104(1)(c) and the multi-municipal plan.
Commentary: Gauging Regulatory Consistency with a Local Comprehensive Plan

The Standard Zoning Enabling Act (SZEA), as noted above, required in Section 3, that zoning regulations be “in accordance with a comprehensive plan.” The meaning of that phrase, left undefined in the SZEA, has spawned a large body of litigation and corresponding commentary and analysis on the question of regulatory consistency. Was a separate plan required as a prerequisite to the enactment of a zoning ordinance? Assuming a plan was required, what was the nature of the analysis to be conducted to determine the connection between the plan and the zoning regulations, especially the zoning map.

Several states have provided in their statutes that zoning, and in some cases other land development regulations, must be consistent with and implement the local comprehensive plan.

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specifically, as opposed to the SZEA’s “a comprehensive plan.” Arizona\(^3\) states that zoning ordinance and regulations “shall be consistent with and conform to the adopted general plan of the municipality, if any.” California law\(^4\) is that a zoning ordinance shall be consistent with the general plan of a county or city if the plan has been officially adopted and “if the various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in such a plan.” Delaware\(^5\) provides that the land use map in a comprehensive plan has “the force of law” and “no development shall be permitted except in conformity with the land use map ... and with land development regulations enacted to implement the other elements of the adopted comprehensive plan.” Kentucky\(^6\) requires consistency unless findings are made concerning appropriateness of zoning or that economic, physical, or social changes have occurred that were not anticipated in the comprehensive plan and which have substantially altered the basic character of the area. Maine\(^7\) states that local zoning ordinances and maps must be “pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body.” Nebraska\(^8\) provides that zoning regulations must be preceded by the adoption of a comprehensive development plan and must be consistent with that plan. Oregon\(^9\) states that comprehensive plans “[s]hall be the basis for more specific rules and land use regulations which implement the policies expressed through the comprehensive plans”. Rhode Island\(^10\) defines a comprehensive plan as the document “to which any zoning adopted [pursuant to the statute] shall be in compliance” and, in requiring consistency with the comprehensive plan, specifically provides that the zoning ordinances shall be interpreted to “further the implementation of” the plan. Washington’s Growth Management Act\(^11\) requires city and county land development regulations to be “consistent with and implement” the comprehensive plan, and also\(^12\) provides that the development regulations of cities and counties that are not subject to the Growth Management Act “shall not be inconsistent with the city’s or county’s comprehensive plan” and Wash. Rev. Code (development regulations for cities and counties that plan must be “consistent with and implement” the comprehensive plan). And Wisconsin\(^13\) states that all programs or actions of a local government that affect land use must be consistent with the local comprehensive plan, including annexation and cooperative boundary agreements as well as zoning and subdivision regulation.


CONTENTS OF THE MODEL SECTION

Based in part on a Florida statute, Section 8-104 below embodies the idea that the local comprehensive plan should be implemented through the local regulatory framework—the zoning ordinance, the subdivision ordinance, and related land development regulations—as well as individual development decisions that are either legislative or administrative in nature. The consistency doctrine merges intentions and actions. The local comprehensive plan is not simply a rhetorical expression of a community’s desires. It is instead a document that describes public policies a local government actually intends to carry out. If it were otherwise, why bother to complete and adopt one?

Section 8-104 calls for a written analysis to be conducted by the local planning agency whenever there are land development regulations, amendments, or “land-use actions” proposed. The agency applies a three-prong test in paragraph (3) in evaluating consistency. Here the purpose is to provide positive coordination and to ensure that, when proposals involving land development regulations and individual development decisions arise: (a) there is a careful assessment of their relationships with the local comprehensive plan; and (b) that assessment is part of the public record concerning the legislative or administrative decision. The only situation where such an analysis need not (indeed cannot) be produced is where there is no comprehensive plan with which to compare the land development regulations in states that have not mandated the adoption of a comprehensive plan. Where a comprehensive plan is mandatory and one has not been adopted, the local government’s land development regulations will be void, since they cannot be consistent with the plan.15

The written report must state whether or not, in the opinion of the local planning agency, the regulations, amendment, or action is consistent with the local comprehensive plan. The written report is also to contain recommendations as to whether or not to approve, deny, substantially change, or revise the regulations, amendment, or action. If the agency finds there is an inconsistent relationship between the local comprehensive plan and the proposal, it may also recommend ways of modifying the plan to eliminate it. The written report is advisory to the legislative or administrative body receiving it. The legislative or administrative body may: (a) adopt the report; (b) reject the report; or (c) adopt the report in part and reject it in part. If the body rejects the report or part of it, it must conduct the same analysis that the local planning agency undertook concerning consistency, and must make its own findings before taking action.

8-104 Consistency of Land Development Regulations with Local Comprehensive Plan

1 Land development regulations and any amendments thereto, including amendments to the zoning map, and land-use actions shall be consistent with the local comprehensive plan, provided that in the event the land development regulations become inconsistent


15See Raabe v. City of Walker, 383 Mich. 165, 174 N.W.2d 789 (1970) (absence of a formally-adopted municipal plan does not invalidate zoning but does “weaken substantially the well-known presumption” that normally applies to a zoning ordinance); Forestview Homeowners Association, Inc. v. Cook County, 18 Ill. App. 3d 230, 309 N.E.2d 763 (1st Dist. 1974) (failure of county to comprehensively plan for land use within its jurisdiction and to link land development regulations to plans and data “weaken the presumption of validity which otherwise would attach to a zoning ordinance.”); Board of County Commissioners v. City of Las Vegas, 95 N.M. 387, 622 P.2d 695 (1980)(where the state statute requires zoning regulations to be “in accordance with” a comprehensive plan, the absence of such a plan renders the zoning ordinance invalid).
with the local comprehensive plan by reason of amendment to the plan or adoption of a
new plan, the regulations shall be amended within [6] months of the date of amendment
or adoption so that they are consistent with the local comprehensive plan as amended.

(a) Except as provided in paragraph (1) above, any land development regulations or
amendments thereto and any land-use actions that are not consistent with the
local comprehensive plan shall be voidable to the extent of the inconsistency.

(b) Any land development regulations or amendments thereto shall be void [6]
months from the date on which a local comprehensive plan is required to be
adopted, if a comprehensive plan must be adopted pursuant to Section [7-201]
but no comprehensive plan has been adopted.

(c) As used in this Section, “Land-Use Action” means preliminary or final app-
roval of a subdivision plat; approval of a site plan; approval of a planned unit
development; approval of a conditional use; granting of a variance; adoption of
a development agreement; issuance of a certificate of appropriateness; and a
decision by the local government to construct a capital improvement and/or ac-
quire land for community facilities, including transportation facilities. Approval
as used in this paragraph includes approval subject to conditions.

If a local government is required to adopt a comprehensive plan, but it has not, then its land
development regulations will be voidable, as they are not consistent with a plan. The brack-
eted subparagraph (1)(b) is linked to Alternative 2 for Section 7-201—if Alternative 2 is
adopted, so must the bracketed subparagraph be adopted.

(2) A local government shall determine, in the manner prescribed in this Section, whether
such land development regulations, amendments thereto, and land-use actions are con-
sistent with the local comprehensive plan. Before the legislative body of a local govern-
ment may enact or amend land development regulations and before the legislative body,
the local planning commission, the hearing examiner, the Land-Use Board of Review,
or any other body with administrative authority may take any land-use action, the local
planning agency shall prepare a written report to the legislative or administrative body
regarding the consistency with the local comprehensive plan of: the proposed land de-
development regulations; a proposed amendment to existing land development regula-
tions; or a proposed land-use action. The written report shall be advisory to the legisla-
tive or administrative body. Pursuant to paragraph (3) below, the written report shall
state whether or not, in the opinion of the local planning agency, the regulations, amend-
ment, or action is consistent with the local comprehensive plan. The written report shall
also contain recommendations pursuant to paragraph (4) below as to whether or not to
approve, deny, substantially change, or revise the regulations, amendment, or action.
The local planning agency shall make the written report available to the public at least
[7] days prior to any public hearing or meeting on the regulations, amendment, or action
that is the subject of the report.

(3) The local planning agency shall find that proposed land development regulations, a pro-
posed amendment to existing land development regulations, or a proposed land-use ac-
tion is consistent with the local comprehensive plan when the regulations, amendment,
or action:
(a) furthers, or at least does not interfere with, the goals and policies contained in the local comprehensive plan;

(b) is compatible with the proposed future land uses and densities and/or intensities contained in the local comprehensive plan; and

(c) carries out, as applicable, any specific proposals for community facilities, including transportation facilities, other specific public actions, or actions proposed by nonprofit and for-profit organizations that are contained in the local comprehensive plan.

In determining whether the regulations, amendment, or action satisfies the requirements of subparagraph (a) above, the local planning agency may take into account any relevant guidelines contained in the local comprehensive plan.

(4) If the local planning agency determines that the regulations, amendment, or action is not consistent with the local comprehensive plan, it:

(a) shall state in the written report what changes or revisions in the regulations, amendment, or action are necessary to make it consistent; and

(b) may state in the written report what amendments to the local comprehensive plan are necessary to eliminate any inconsistency between the plan and the regulations, amendment, or action.

(5) The legislative or administrative body shall, upon receipt of the written report of the local planning agency, review it and, giving the report due regard, shall in the written minutes of its deliberations:

(a) adopt the report;

(b) reject the report; or

(c) adopt the report in part and reject it in part.

(6) If the legislative or administrative body rejects the report in part or in whole, in the written minutes of its deliberations:

(a) it shall state whether the proposed land development regulations, a proposed amendment to existing land development regulations, or a proposed land-use action is consistent with the local comprehensive plan pursuant to paragraph (3) above; and/or

(b) if the legislative or administrative body determines that the regulations, amendment, or action is not consistent with the local comprehensive plan:

1. it shall state what changes or revisions in the regulations, amendment, or action are necessary to make it consistent; and/or

2. it may state what amendments to the local comprehensive plan may be necessary to eliminate any inconsistency between the plan and the regulations, amendment, or action.
Appendix 6A-4: APA Provisions for Amending Urban Growth Boundaries

Article XI enables municipalities planning together to designate growth, future growth, and rural resource areas. Section 1104(c) requires that if they choose to do this, the plan must also provide a process for review of those designations. Although designated growth areas are not urban growth boundaries per se, like them, they will be defined by area in the multi-municipal comprehensive plan and zoning maps, and are authorized to be shown on the official map. Section 1103(c).

Again, Stuart Meck’s discussion of urban growth boundaries and a recommended process for reviewing them and revising them, if appropriate, could be adapted for multi-municipal planning agreements. Obviously some of these recommendations are not suitable for Pennsylvania. (For instance, Pennsylvania has no unincorporated territory, and with 2,567 municipalities may not want to have growth areas in every municipality within a multi-municipal planning area.) As recommended throughout this manual, it is advisable for participating municipalities to be as specific as possible in defining these processes and determinations, both for the purpose of making their own determinations as to what is generally consistent and what is not, and in order to give these determinations maximum credibility to landowners, state and local agencies and authorities, and the courts.
THE MODEL STATUTE

The following Section provides optional statutory language to further guide the process of designation of urban growth areas as part of the preparation of a regional (or county) comprehensive plan, and that would apply to municipalities (as well as other local governments, if applicable) in the regional or county planning agency’s jurisdiction. It is based in part on the Washington state statute and administrative rules.113

The model language places the overall responsibility for the designation at the regional or county level; if there is no regional planning agency in place then one will need to be created or the authority will instead rest with the county planning agency. Whether or not urban growth areas are allowed by a state is a policy judgment on behalf of the state legislature and/or the local governments in a region.114 There are clearly costs and benefits to the use of urban growth areas and there can be a fair degree of debate on whether they should be employed and in what manner. However, if they are, the Guidebook advocates having one agency with a multi-jurisdictional perspective overseeing the designation process, rather than a collection of local governments individually determining growth boundaries on an ad hoc, uncoordinated basis. Developing an overall regional growth strategy first will enable each local government to develop a growth strategy that is consistent with the regional strategy as well as with the growth strategies of neighboring jurisdictions.

Absent a regional (or county) framework, the consequence of either a single or scattered group of local governments initiating urban growth areas on their own will likely result in a situation where:

(a) growth is simply shifted away from one part of one community in the urban area to another community in the area; or

(b) growth may bypass the enacting community and jump outward to the next tier of vacant, but developable land.

Moreover, a regional urban growth area framework spreads the benefits of the system among the central cities, the inner ring of developed and mature suburbs, developing suburbs, and the rural areas beyond. Under this optional Section:

1. If a state has adopted a state land development plan that provides standards and criteria for the establishment of urban growth area boundaries (see Section 4-204), the regional (or county) comprehensive plan must incorporate those standards and criteria. If not, then the regional or county planning agency is free to develop its own boundaries, consistent with the requirements of the statute.


114 An argument against urban growth areas may be that they would not be particularly workable in rural areas with diffuse population and no real urban centers. A state legislature may wish to adapt this model by authorizing urban growth areas only in counties that are part of metropolitan areas, but not in nonmetropolitan counties.
2. The regional or county planning agency must consult with municipalities and other local
governments in its planning jurisdiction concerning the designation of urban growth ar-
eas. Each municipality must be included in an urban growth area, but such an area may
also include more than one municipality. This is intended to ensure that urban develop-
ment is supported by the kind of urban services typically provided by a municipal gov-
government.

The type of local government that would have a role in the designation process will vary
by state. For example, in parts of the country, where towns or townships have authority
over land use in unincorporated areas but lack the full range of municipal powers, they
would be participants in the discussion over the location and extent of urban growth ar-
eas. In some states, such as Virginia and Maryland, counties have powers that are simi-
lar to or identical with municipalities. The Section that follows would need to be modi-
fied to reflect the role of counties in such situations.

3. If an agreement is reached with a municipality concerning the location and size of the
urban growth area, then the regional or county planning agency incorporates or adopts
that designated urban growth area into its regional or county comprehensive plan. The
municipality must also incorporate the urban growth area into its own local comprehen-
sive plan.

4. If no agreement is reached, the regional or county planning agency must state in writing
its determination regarding the designation of the urban growth area. The municipality
may then appeal that determination to a state comprehensive plan appeals board (see
Sections 7-402.1 and 7-402.3) or other entity. However, the municipality must first fol-
low any procedures for dispute resolution under rules promulgated by the state planning
agency.

5. After the urban growth areas have been designated and incorporated into regional and
local plans, the regional or county planning agency, municipalities, and other affected
local governments must then:

   (a) establish and maintain a land market monitoring system (see Section 7-204.1,
       Land Market Monitoring System, in Chapter 7); and

   (b) periodically review—at least on a five-year basis (and more often as neces-
       sary)—the growth area and consider amendments to such a growth area to en-
       sure there is an adequate supply of buildable land.

The urban growth area designation process, it must be emphasized, is not to be em-
ployed by an individual municipality (or other local government) without the framework
provided by a regional or county planning agency as described below. THIS IS IM-
PORTANT: The provisions of Section 6-201.1 for establishing urban growth areas
are only to be used if these conditions are met.
In addition to criteria for the general designation and priority of designation of urban growth areas, Section 6-201.1 includes language authorizing the establishment of an urban growth area in unincorporated territory to allow for the establishment of a new fully contained community that will be supported by urban services.

6-201.1 Urban Growth Areas [Optional]

(1) A [regional or county planning agency] [shall or may] designate urban growth areas pursuant to this Section, Section [6-201, Alternative 2], Section [7-402.2], and Section [7-204.2].

(2) The purposes of an urban growth area are to:

(a) provide a mechanism whereby a [regional or county] planning agency and the local governments within its planning jurisdiction may coordinate the location and extent of urban growth;

(b) ensure a pattern of compact and contiguous urban growth;¹¹⁵

(c) encourage preservation and adaptive reuse of historic buildings;

(d) protect agricultural and forest lands, scenic areas, and other natural resources, living and non-living, from urban development;

(e) identify where urban services are being or will be provided;

(f) direct growth to where infrastructure capacity is available or committed to be available in the future;

(g) ensure that an adequate supply of buildable land for at least [20] years is provided; and

(h) ensure a variety of affordable housing types at varying densities;

(3) Each municipality shall be included within an urban growth area. However, an urban growth area may contain more than one municipality, as determined by the [regional or county planning agency] based on factors affecting the municipalities in common that may include, but shall not be limited to, [any goals, policies, and guidelines in the state land development plan pursuant to Section [4-204(5)(c),] topography, rates of growth, degree of existing urbanization, and sharing of and/or efficiency in providing urban services.

¹¹⁵ For an analysis of the impact that Oregon’s statewide land-use planning system has had on development patterns, see Jerry Weitz and Terry Moore, “Development Inside Urban Growth Boundaries: Oregon’s Evidence of Contiguous Urban Form,” Journal of the American Planning Association 64, no. 4 (Autumn 1998): 424-440.
(4) An urban growth area may also include unincorporated territory, but only if such territory:

(a) already has urban growth located on it;

(b) will be, or may easily be, provided with urban services [under an urban service agreement pursuant to Section [6-403]]; or

(c) has been or is proposed to be designated as a new fully contained community pursuant to paragraph (8) below.

(5) In designating any urban growth areas, each [regional or county planning agency] shall use the following general procedure, but may adopt additional procedural rules to ensure and enhance a cooperative effort among local governments within its planning jurisdiction, provided that such additional rules do not conflict with this procedure and any rules adopted by the [state planning agency]:

(a) The [regional or county planning agency] shall consult with all municipalities [and other local governments such as boroughs, towns, or townships] located within its planning jurisdiction concerning the designation of urban growth areas and shall ensure early and continuous public participation in the designation process pursuant to Section [6-301] and Section [7-401], respectively;

(b) Each municipality shall propose to the [regional or county planning agency] the designation of an urban growth area that shall include the area within its municipal boundary and that may include additional unincorporated areas contiguous to its municipal boundary;

(c) The [regional or county planning agency] shall attempt to reach agreement with each municipality located within its planning jurisdiction on the location and size of the urban growth area;

(d) If an agreement is reached with a municipality, the [regional or county planning agency] shall incorporate and adopt that designated urban growth area into its [regional or county] comprehensive plan and shall delineate an urban growth boundary on the plan map pursuant to Section [6-201(5)(g)1; Alternative 2]. The municipality [as well as each local government included in a designated urban growth area] shall also incorporate and adopt the urban growth area into its own local comprehensive plan and shall delineate an urban growth boundary on the generalized composite comprehensive plan map pursuant to Section [7-201(8) above] and on the future land-use plan map pursuant to Section [7-204(6)(c)7] above.

116 The authority of a municipality to plan extraterritorially varies among the states. For example, a municipality may have the power to review and approve subdivisions within a certain radius of its boundaries for consistency with a thoroughfare plan and municipal engineering and design requirements.
(e) If the [regional or county planning agency] does not reach an agreement with a municipality within its planning jurisdiction on the designation of the urban growth area, the [regional or county planning agency] shall state in writing its determination regarding the designation of the urban growth area and the basis for that determination. The municipality may appeal the [regional or county] planning agency’s determination to the [state comprehensive plan appeals board or other entity] pursuant to Section [7-402.3] below, provided however, that the municipality shall first follow any procedures for dispute resolution under any rules promulgated by the [state planning agency] pursuant to paragraph (10) below.

(6) Any urban growth area established pursuant to this Section shall meet the following criteria:

(a) The urban growth area(s) on a [region or county] shall contain land areas and minimum densities and intensities of land uses sufficient to accommodate [between [115] percent and [125] percent of] the urban growth that the [regional or county planning agency] has projected to occur in the [region or county] for the succeeding [20]-year period; and

♦ The numbers in brackets regarding the additional percentage of land areas that are necessary to accommodate urban growth are guidelines that are intended to ensure that there is a sufficient supply of vacant land inside the urban growth area boundary. The provision of additional land may thereby allow the efficient and competitive functioning of the real estate market and prevent landowners from monopolizing large parcels of vacant land, consequently driving up land prices. Depending on the type of system used to project urban growth and land supply needs, it may not be necessary to incorporate the bracketed percentages in the statute.

(b) The urban growth area(s) shall contain those lands designated for land uses that are allocated to the urban growth area by the projections in the [regional or county] comprehensive plan pursuant to Section [6-201(3)(i); Alternative 2]. The densities and intensities of those land uses shall be stated in the [regional or county] comprehensive plan pursuant to Sections [[6-201(5)(c) and (g); Alternative 2] [and shall be as specified in the state land development plan pursuant to Section [4-204(5)(c)]].

(7) A [regional or county planning agency] shall observe the following sequence in designating land for urban growth in an urban growth area established pursuant to paragraph (6) above:

(a) first, those land areas that are already characterized by urban growth and that have adequate existing urban services;
(b) second, those land areas primarily characterized by urban growth that are or will be served adequately by a combination of existing and future urban services provided by public or private entities [under an urban service agreement pursuant to Section [6-403]]; and

(c) third, those remaining land areas that are primarily vacant that will be served adequately by future urban services provided by public or private entities [under an urban service agreement pursuant to Section [6-403]].

(8) In addition to following the sequence set forth in paragraph (7) above to designate land for urban growth, a [regional or county planning agency] may also, after consulting with municipalities and other local governments within its planning jurisdiction, establish by rule a process to designate an urban growth area in unincorporated territory in order to allow for the establishment of a new fully contained community, provided that the following criteria are satisfied:

(a) the planning for such a community complies with all other requirements of this Act, including the establishment of minimum land-use densities and intensities;

(b) a mix of uses is provided for in order to offer jobs, housing (including affordable housing), and retailing to residents of the new community;

(c) the urban growth in such a fully contained community will be supported by urban services; and

[(d) add other criteria, as desired].

(9) The [regional or county planning agency] [,] [and] any municipality [, and any other applicable local government] that is included in a designated urban growth area shall:

(a) establish and maintain a land market monitoring system pursuant to Section [7-204.1];

117 For example, the Washington state statutes provide “New fully contained communities may be approved outside established urban growth areas only if a county reserves a portion of the twenty year population projection and offsets the urban growth area accordingly.” Wash. Rev. Code. §36.70A.350(2) (1996).

118 Section 7-204.1 describes a land market monitoring system and the procedures for reviewing the urban growth area and determining whether the growth area needs to be amended.
(b) evaluate the need to amend such urban growth area, the [regional or county] comprehensive plan, the local comprehensive plan, and the land development regulations of the affected local government:

1. at least every [5] years; and/or

2. when such urban growth area does not contain sufficient buildable lands to accommodate residential, commercial, and industrial needs for the next [20] years, as found pursuant to Section [7-204.1(5)].

Subparagraph (b) requires that the urban growth area as well as the underlying comprehensive plans and local land development regulations be reevaluated at least every five years, and more often when the urban growth area has an insufficient supply of buildable lands to meet foreseeable needs.

(c) take other necessary implementing actions, including, but not limited to, restrictions on the provision of urban services, to ensure that urban growth occurs within the urban growth area.

(10) Pursuant to Section [4-103], the [state planning agency] may adopt rules and, upon adopting rules, prepare and distribute guidelines in order to further implement this Section. These rules may include procedures for dispute resolution regarding the designation of urban growth areas.

(11) The urban growth area shall be amended in the same manner as the original designation pursuant to this Section.

(12) Pursuant to [Section 7-402.3], any municipality [or other local government] may appeal the written determination of a [regional or county planning agency] designating a proposed urban growth area under subparagraph (5)(e) above.
Appendix 6A-5: Private Property Rights

“(N)o shall private property be taken for public use without just compensation.”

Fifth Amendment, U.S. Constitution

Physical Occupation. There is little doubt among constitutional scholars that what the framers of the Constitution had in mind in the Fifth Amendment was to assure that if private property was taken and occupied by the government for some purpose—a road, utility, park, or housing the king’s troops (which was common prior to the American Revolution)—the government had to pay the owner for the property or the value of the part of it that was taken. The “takings” amendment has been addressed in all states by the adoption of eminent domain statutes that provide a process for determining the value of a property interest taken for public use. Permanent physical occupation of an owner’s property is a per se taking for which compensation is due, even if the occupation is “no bigger than a breadbox.” Lorretto v. Teleprompter, 458 US 419 (1982) (cable television box).

Regulatory Taking. Concurrently with the development of land use, health and safety, and environmental regulation in this century, the concept of a “regulatory taking” has developed. The first major case was a Pennsylvania case—Pennsylvania v. Mahon Coal Co., 260 U.S. 393, decided by the U.S. Supreme Court in 1922. In his opinion, Justice Oliver Wendell Holmes stated, “The general rule at least is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.” The property at issue was subsurface coal rights affected by a statute aimed at preventing subsidence by banning certain coal removal. The case, remanded to Pennsylvania to determine whether there was such a taking, was settled, but the principle remained, and has been developed further in subsequent cases.

Another U.S. Supreme Court case Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) established the constitutionality of zoning for the first time. There the Court upheld zoning preventing location of an industrial use in a residential area designated according to an overall town plan as a constitutional exercise of the police power to protect the public health, safety, and welfare. Since then a number of cases have refined the applicable principles when a landowner challenges a land use regulation as a taking of his property. In Agins v. City of Tiburon, 447 U.S. 255 (1980), the Court framed a frequently stated principle that a regulation is a taking if it fails to substantially advance a legitimate state interest or if it deprives the owner of economically viable use of land. In that case, a scenic zoning ordinance was upheld against a challenge that it was on its face a “taking.”
In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) the Court upheld New York’s Historic Landmark Commission’s decision against the building of a tower in the air rights over Grand Central station. The ordinance was found to be a legitimate exercise of the police power to protect a substantial public interest in an historic resource. The Court noted that the ordinance addressed “investment backed expectations” by providing for a transfer of development rights program that allowed the owner to sell its air rights. The Court noted that every regulatory taking case requires an ad hoc examination of the facts in relation to the challenged law, and articulated three important principles for consideration:

1) Economic impact of the regulation on the property owner
2) Extent of interference with investment-backed expectations
3) Character of the governmental action

Pennsylvania’s Supreme Court followed the Penn Central decision in *United Artists Theater Circuit Inc. v. Philadelphia*, 535 Pa 310 (1993), which upheld Philadelphia’s historic preservation ordinance, but determined that the ordinance did not authorize regulation of the interior. However, the Court acknowledged Pennsylvania’s Environmental Rights Amendment and recognized that under it and constitutional case law, the state may exercise its police power “to preserve aesthetic and historic resources.”

*Keystone Bituminous Coal Assn. v. DeBenedictus*, 480 U.S. 470 (1987) upheld a Pennsylvania statute aimed at preventing subsidence under pre-1966 buildings by requiring the leaving of coal pillars in the ground as a valid exercise of the police power, suggesting even that subsidence could be regulated as a nuisance. Both *Penn Central* and *Keystone* looked at the landowners entire property interest in deciding whether the regulation effected a taking, and concluded that the regulation still allowed the owners reasonable economic use of their properties. Dissenters in both cases wanted to look only at the interest allegedly being taken as the “property.” This is the focus of contention today as some landowners argue that courts should limit their consideration to the piece of land affected by a regulation—the air rights or the area of coal or the wetlands being “taken”—rather than the “bundle of sticks” that comprise the owners entire property interest.

*Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), reinforced and elaborated upon the rule that compensation is due if a regulation “denies all economically beneficial or productive use of the land.” Because Lucas’ two dune lots had already been separated from his 280 acre seaside development, the absolute ban on building on the dunes imposed by the Coastal Commission was deemed a “categorical taking,” unless some other principle of changed circumstances or state nuisance or property
law applied. On remand to South Carolina, no preexisting principle of state law was presented and compensation of over $1 million was awarded.

As noted above, the major contention in takings law today is characterization of the property—is it the entire property owned at the time of a permit application or only the piece that is affected by the regulation at issue? In *Loveladies Harbor v. U.S.*, 28 Fd 3rd 1171 (Fed. Cir. 1994), the Court ruled that 12 acres of wetlands out of the 51 remaining acres owned by the developer was the property to be considered. Before enactment of Section 404 of the Clean Water Act, the owner had developed 199 acres of his original parcel consisting mostly of wetlands. The ruling in this case was influenced by the expectations of the owner because of the tortured history and conflicting rulings of the N.J. DEP, which had allowed the owner to develop these 12.5 acres in exchange for protecting the 38.5 remaining acres, and the Army Corps of Engineers, which denied the permit.

A landmark decision by the Pennsylvania Supreme Court, *Machipongo Land and Coal Company v. Department of Environmental Protection*, issued May 30, 2002, 2002 WL 1070113 (Pa), reversed a 1998 decision of the Commonwealth Court ruling that 154 acres of coal land declared unsuitable for mining by PA DEP was the area to be considered for takings purposes, not the total 3,387 acres owned by the coal operator. That decision was at odds with federal and state takings cases in determining that regulation of a piece of an owner’s property interest is the “denominator” for purposes of a takings analysis and that compensation would therefore be required, even if profitable use could be made of the whole property. Having so decided, the lower court refused to consider whether the public interest in preventing pollution of a high quality trout stream that prompted the regulation was justified under *Lucas* as preventing a public nuisance.

In a unanimous opinion written by Justice Newman, the Pa Supreme Court reviewed federal and state takings law, including the recent *Tahoe* decision by the U.S. Supreme Court, *infra* pages 6A-47 to 6A-48, and reaffirmed the Pennsylvania Court’s agreement with the principles announced in *Penn Central* and *Keystone*. The Court concluded that the property owners’ interests must be looked at as a whole, and applying a *Lucas* analysis, that owner Machipongo had not been deprived of all economically beneficial use of its property. As to other owners the case was remanded to the Commonwealth Court to determine the extent of their property interests applying a traditional takings analysis, and to determine whether potential pollution of the stream and watershed would constitute a public nuisance that may be prohibited under *Lucas* without compensation.
The state of a property owner’s knowledge and investment-backed expectations have an important bearing in regulatory takings case law. If the law changed after the owner purchased property for an intended purpose, and the public purpose is not strong in terms of preventing a nuisance or changed knowledge, as to health, safety, and welfare needs, the courts are more likely to find a taking than in a case where the property owner knew or should have known the rules governing development of the property. *Good v. U.S.*, 189 F. 3rd 1355 (Fed. Cir. 1999).

Additional Takings Principles. There are several additional takings principles developed through case law that municipal officials should be aware of in considering the effect of any proposed regulation. To summarize them briefly:

1. **Ripeness.** A landowner must obtain a final decision determining the permitted use for the land before asserting a takings claim. Once it is clear that the agency or governing body lacks discretion to permit development or permissible uses are known to a reasonable degree of certainty, a takings claim is ripe. *Palazzolo v. R.I.*, 533 U.S. 606 (2001). Corollary: Government may not burden landowner with imposition of repetitive or unfair procedures to avoid a final decision.

2. **Temporary Takings.** Government can be required to pay compensation for a temporary taking of land. In *First Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987), the owner was entitled to file a claim for a “temporary taking” where a moratorium on building in the floodplain prevented rebuilding of a church destroyed by fire. On remand, however, the California court determined that the moratorium was justified on public safety grounds and concluded there was no “taking.” A Pennsylvania case, *Miller & Son Paving, Inc. v. Plumstead Township*, 552 Pa. 652 (1998), refused to sustain a “temporary takings” claim for the period that it took the landowner to bring a successful curative amendment challenge to the zoning ordinance for failing to provide adequately for his proposed use (quarrying process on agriculturally zoned land). The recent U.S. Supreme Court decision, *Palazzolo v. Rhode Island*, *supra*, held that the landowner could file a temporary takings claim even though he acquired the property in question after promulgation of regulations that would prevent building in coastal wetlands.

3. **Exactions.** There must be an “essential nexus” between conditions imposed on building permits and the public interest to be served by the conditions. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court found the state failed to establish that nexus when it required a public access easement across landowner’s beachfront property as a condition of issuing a permit to demolish a bungalow
and build a larger house. In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the court found no essential nexus and no “rough proportionality” between development burdens imposed on approval for expansion of plumbing and electrical store business, a public greenway in the floodplain along the creek, and dedication of land for an adjacent bike path.

4. Moratoriums. In *Naylor et. al. v. Township of Hallam Township*, 565 Pa. 397 (2001), the Pennsylvania Supreme Court ruled that the power to impose a temporary moratorium on subdivision and land development approvals while the township revised its comprehensive plan and ordinances could not be implied from the provisions of the Municipalities Planning Code and that the township’s moratorium was, therefore, invalid. The court did not need to reach the constitutional issue, but seemed to invite the legislature to specifically address the issue of moratoria. In other states, moratoria have been upheld against takings challenges if they are specifically authorized by statute (or implied in some states), are for a reasonable period of time (usually one year to eighteen months), and are tied to the need for comprehensive revision of plans and ordinances to deal with development pressure.

A major decision by the U.S. Supreme Court in *Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency, et al*, 122 S. Ct. 1465 (2002), issued April 23, 2002, affirmed the decision of the California Supreme Court, 216 F. 3rd 764 (9th Cir 2000), that two moratoria totaling 32 months did not effect a *per se* taking of petitioners’ land. In a 6-3 decision, the Court ruled that the moratoria imposed on all development in certain areas while the agency continued to study the impact of development on Lake Tahoe for the purpose of developing “environmental threshold carrying capacities” was a legitimate planning tool, not a temporary taking automatically requiring compensation as a *per se* categorical taking under *Lucas*. Justice Stevens’ majority opinion reviews the Court’s major takings decisions, notes that unlike physical takings, “nonpossessory” regulatory takings are not specifically covered by the 5th amendment, and reaffirms the *Penn Central* “essentially ad hoc, factual inquir(y)” approach to regulatory takings that “looks at the particular circumstances of the case” to determine whether a taking has occurred.

The majority opinion contains many reaffirmations of the balanced approach to regulatory takings that the Court set forth in *Penn Central, Keystone*, and other cases. The Court “must focus on the property as a whole” (Slip Opinion at p 23) (quoting *Penn Central*, “‘Takings’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated” 438 U.S. at 130). The Court approves the California Appeals Court’s reasoning that “a regulation that affects only a portion of the parcel—whether limited by time, use, or space—does not deprive the owner of all economically beneficial use.” Slip Opinion at 14. “—our holding [in *Lucas*] was
limited to ‘the extraordinary circumstance when no productive or economically beneficial use of land is permitted.’ Slip Opinion at 26.

As to the question of whether the constitutional concepts of “fairness and justice” underlying the takings clause “will be better served by a categorical rule or by a Penn Central inquiry into all of the relevant circumstances in particular cases,” the Court states: “From that perspective, the extreme categorical rule that any deprivation of property of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained.” Id. at 31.

As to the legitimacy of moratoria, the Court notes that “the consensus in the planning community appears to be that moratoria, or ‘interim development controls’, as they are often called, are an essential tool of successful development,” citing both statutory authority and planning treatises. The Opinion recognizes a valid interest in deliberate decision-making, and in having extensive landowner and public participation and development in the development of a plan.

“We would create a perverse system of incentives were we to hold that landowners must wait for a taking claim to ripen so that planners can make well-reasoned decisions, while at the same time, holding that those planners must compensate landowners for the delay. Indeed, the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering an individual permit.” Id. at 36-37.

The Court also refuses petitioners’ requests to limit a temporary moratorium to one year. “Since a categorical rule tied to the length of deliberations would likely create added pressure on decisionmakers to reach a quick resolution of land-use questions, it would only serve to disadvantage groups who are not as organized or familiar with the planning process.” Id. at 37.

Chief Justice Rehnquist wrote the dissenting opinion joined in by Justices Scalia and Thomas.

We have described this most recent decision of the Supreme Court at some length because it deals with a number of issues important to the planning and implementation process in Pennsylvania and elsewhere.

Sources:

