Chapter 7: Special Implementation Topics

Appendix 7A-1: Planning Together to Survive Zoning Challenges

Many planners are professional worriers. When a planner helps a group of municipalities prepare a multi-municipal comprehensive plan, followed by the ordinances necessary to implement the plan, the planner often worries about how much land should be included in the higher density districts of the Designated Growth Areas. Planners also work to balance lot sizes, densities and other standards with the protection of farmland and natural resources in Rural Resource Areas. The rights of property owners are another critical concern. Planning and zoning mistakes can have major and lasting impacts on communities.

Certainly, planners rely on municipal solicitors to provide advice on statutes and case law decisions. But often, the planner is directed to do a “study” or “fair share analysis” to evaluate what types of housing have been built in the local area and how much new housing might represent a fair share of the regional housing growth. These analyses provide a basis for planning and for legal defense if the zoning provisions are challenged.

In this chapter, planning matters related to fair share housing and the reasonableness of rural zoning standards will be addressed. Two Pennsylvania Supreme Court decisions, one in 2002 and the other in 2003, provide guidance for municipal officials and planners in determining an appropriate and defensible amount of undeveloped land in Designated Growth Areas and what provides reasonable use of land in the Rural Resource Areas. Both of these issues are important to groups of municipalities planning regionally and facing significant growth pressures; those areas on the urban fringe. These matters may have limited concern and applicability to groups in the truly rural parts of Pennsylvania.

The two Supreme Court cases discussed in this chapter should be viewed as case studies from the Southeast area of the Commonwealth. The important learning point from the fair share housing case is that multi-municipal planning should employ a logical and systematic method, based on sound information and criteria, to project the amount of multi-family or higher density housing that could be reasonably expected for the planning period. Then planners should make sure there was a sufficient amount of undeveloped land to accommodate the projected housing growth in Designated Growth Areas. The specific methodology used by the planning group should be tailored to the place and the partners and must lead to understandable conclusions.
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Both cases dealt with the reasonableness of the zoning standards applied to land in Rural Resource Areas. Fairness to the landowners must be given adequate attention in planning and zoning. The Supreme Court suggested that flexible standards, where development is limited by the characteristics and natural constraints of the land rather than by uniform large-lot requirements, provide a more reasonable approach.

A Short History of Joint Municipal Planning

Pennsylvania is a Dillon’s Rule state. Dillon’s Rule is a legal principle derived from an Iowa decision by Judge John F. Dillon in 1868 and is a rule of construction for local government powers. Under Dillon’s Rule, municipalities have certain powers:

- Those granted by the legislature in express words.
- Those necessary or fairly implied in or incident to the powers expressly stated.
- Those that are essential to the declared objects and purposes; not simply convenient, but indispensable.
- If there is any reasonable doubt whether a power has been conferred on a local government, then the power has not been conferred.

When the Pennsylvania Municipalities Planning Code (MPC) was enacted in 1968, it authorized municipalities to plan together, but there was no authorization to zone together. As such, joint municipal planning was a “toothless tiger.”

There were several judicial decisions in 1970 that seemed to indicate that the Pennsylvania Supreme Court suggested that planning and zoning should be done cooperatively.

In the Girsh Appeal, the court said in a footnote, “Perhaps in an ideal world, planning and zoning would be done on a regional basis so that a given community would have apartments, while the adjoining community would not. But as long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of the surrounding communities and the central city.” 263 A.2d 395 (Pa. Supreme Court 1970)
That same year, in the *Appeal of Kit-Mar Builders*, the court also stated, “We fully realize that the overall solution to these problems lies with greater regional planning, but until the time comes that we have such a system we must confront the situation as it is.” 268 A.2d 765 (Pa. Supreme Court 1970).

In several places, forward thinking municipal officials took these words as the Supreme Court’s strong suggestion, if not its endorsement, that regional planning was the more rational way to plan and zone for all land uses. Regional planning commissions were formed, regional comprehensive plans were adopted and land uses were allocated to logical areas through zoning ordinances of the participating municipalities.

Harris Township, outside of State College, participated in a regional planning program with about ten other municipalities in that area. Harris Township did not have zoning for mobile home parks; several others did. Developers challenged Harris Township’s lack of zoning for mobile home parks. The Commonwealth Court said the township’s only defense was its membership in a regional planning effort with an approved regional comprehensive plan and that the township claimed credit for mobile home park zoning under the ordinances of the other municipalities. Harris Township lost. The court said comprehensive plans do not have the same legal effect of zoning ordinances. Only zoning is regulatory and townships have no control over the zoning practices of others. The court did say it might be a good idea for the General Assembly to empower municipalities to enter into binding regional zoning arrangements with decisions related to land uses made on the best planning principles rather than what might pass constitutional muster. (*Nicholas, Heim & Kissinger v. Harris Township* 375 A.2d 1983 (Pa. Cmwlth. 1977)). In a similar matter involving Fox Chapel Borough, near Pittsburgh, and its participation in a regional comprehensive plan, the Commonwealth Court simply referred to the Harris Township decision. The borough lost. (*Fox Chapel Borough Appeal* 381 A.2d 504 (Pa. Cmwlth. 1978). It was that Dillon’s rule principle.

In response to these decisions, the legislature enacted Article XI-A of the MPC, which permitted joint municipal zoning in 1978. In 1988, the provisions were revised and Article VIII-A replaced XI-A.

However, the joint municipal zoning ordinance (JMZO) requirements under XI-A and VIII-A were not easy for municipalities. For example, all participating municipalities had to enact the single zoning ordinance and any subsequent amendments. Pull out provisions were difficult. A municipality could not pull out in the first three years. However, at the end of the second year, a municipality may enact an individual ordinance that will not be effective for one year and the municipality must give the others one
year notice of the repeal of the JMZO. The repeal and withdrawal may be effective in less than one year if all other municipalities agree. When first enacted, there had to be one joint municipal zoning hearing board, which was a requirement that was hard to accept.

Articles XI-A and VIII-A were not used much. As best as can be found, there were three joint municipal zoning ordinances adopted in the 22 years between 1978 and 2000 in Pennsylvania. Less than a dozen municipalities were involved.

A Shorter History of Multi-municipal Planning

In September 1998, Governor Tom Ridge’s appointed 21st Century Environment Commission published its report which stated that sprawl was environmentally damaging and very expensive in terms of governmental services. Individual planning and zoning by more than 2,500 municipalities in Pennsylvania resulted in land use patterns that resulted in sprawl. The commission recommended legislative changes that would encourage cooperative planning and zoning.

In January of 2000, 10,000 Friends of Pennsylvania published The Costs of Sprawl in Pennsylvania, prepared by the respected national real estate and land use consulting firm of Clarion Associates, Inc. This study quantified the hidden and varied costs of our contemporary pattern of sprawling development to Pennsylvania residents and communities.

In June of 2000, the MPC was amended by Acts 67 and 68 to make it easier for municipalities to cooperate in their planning and zoning activities. Cooperating municipalities were authorized to enact a single multi-municipal comprehensive plan which would be implemented by separate and individual zoning ordinances that are generally consistent with the plan.

Quotes from the 21st Century Environment Commission report:

“Sprawl harms the environment, increases the cost of infrastructure and exacerbates the abandonment of existing communities.”

“Sprawl is expensive. Although some do not consider land use an environmental problem, the pattern of negligent growth creates both direct environmental impacts and higher public costs. This inefficient use of public capital also results in secondary environmental impacts.”

“Sprawl in Pennsylvania continues to absorb large amounts of public capital...The inevitable higher costs bring higher taxes. Sprawling development is likely to increase the total public capital cost burden to local government for open space, roads, schools and utilities.”
In November of 2004, the MPC was again amended by Act 99 to permit noncontiguous municipalities that are located in the same school district to participate in multi-municipal planning. Previously, all municipalities had to be contiguous.

In late 2005, it was estimated that approximately 200 multi-municipal planning programs, involving about 750 municipalities, were in some stage of planning in the five years since enactment of Acts 67 and 68.

**Why Multi-municipal Planning is Important for Pennsylvania**

In addition to planning in much more effective and efficient ways, multi-municipal planning will also help municipalities address the judicial mandates related to the provision for all reasonable land uses in adequate amounts through the municipal zoning powers. Multi-municipal planning may help municipalities discourage the filing of constitutional challenges to their zoning ordinances or help successfully defend the ordinances when challenges are leveled against their ordinances.

Case law has interpreted the MPC to require planning for all uses (e.g. apartments, townhouses, mobile home parks, quarries, etc.) in each and every municipality that enacts a zoning ordinance. The Courts’ goal was not to allow one municipality to “close its doors at the expense of surrounding communities and the central city.” *(Girsh Appeal, 263 A.2d 395 Pa. Supreme Court 1970)*. A zoning ordinance cannot exclude a legitimate use of land from the community.

This is a critical point. For a municipality that approaches planning individually, that municipality must provide for all land uses and, when it is in the path of growth, in sufficient amounts within its boundaries. That’s often very inefficient and a costly way to provide for needed services. In a multi-municipal plan, a more efficient, rational and cost effective land use pattern is likely to result when growth is better managed in terms of type, location and amount.

Exclusion. There are two general types of exclusion:

**Total Exclusion (De Jure).** An ordinance that specifically prohibits or fails to make any provision for a specific use is said to have a facial or “de jure” exclusion of that use. Examples: An ordinance may specifically prohibit quarries or makes no provision for mobile home parks.

**Partial Exclusion (De Facto) Fair Share Issue.** An ordinance, which permits a specific use, but fails to provide sufficient land or otherwise negates the practical development of that use, is said to have a “de facto” exclusion. Particularly related to housing, an inadequate amount of land devoted to the development of multi-family housing or mobile home parks may be said to not provide for a fair share of the regional housing growth. It would be “tokenism.” Examples: A 40,000-acre municipality, in the path of growth, may provide only 5 acres for mobile home parks. Alternatively, a municipality may provide 100 or 200 acres for mobile home parks, but all the land is located in flood plain areas.
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The MPC provides that all categories of land uses be accommodated within the area of the multi-municipal plan. There are various ways the cooperating communities may approach this matter. They could choose to have each participating municipality accommodate all land uses that an individual municipality would address thorough its zoning. However, all uses need not be provided in every municipality involved in a multi-municipal comprehensive plan, but may be planned and provided for within a reasonable geographic area of the plan. The rationale for the chosen approach should be adequately described in the multi-municipal comprehensive plan. Otherwise, the approach may be viewed as arbitrary and susceptible to legal challenges.

Percentage of Land Area vs. Housing Analysis

In most communities, the largest portion of land area provides for residences as the primary developed use, even in areas where the goals are to protect agricultural soils and farm uses. Even in cities, the area used or zoned for residential uses is greater than all other uses combined. Planning and zoning for residential uses, in terms of location, types, intensities and amounts, is a major consideration. Many aspects of planning for residential uses are related to services, facilities, community character and similar matters. Others, however, are purely legal. With the guidance of municipal solicitors, planners rely on the findings of the Pennsylvania courts when they assist in the preparation of comprehensive plans and zoning ordinances. It is particularly important that these plans and ordinances comply with the judicial decisions related to housing and exclusionary zoning.

When exclusionary zoning challenges began popping up in the 1970s, the arguments were initially made and decided by the court based the percentage of land zoned for a certain use, such as multi-family housing, as compared to the total land area of a township. In addition to not excluding various forms of housing outright, municipalities in the path of growth must be prepared to provide for a fair share of the regional housing growth. Following are brief descriptions of just a few cases that dealt with exclusionary zoning over the years.

In a case filed against Willistown Township's zoning ordinance, it was found that 0.7% of the township's area zoned for multi-family uses was exclusionary. Willistown v. Chesterdale Farms 341 A.2d 466 (Supreme Court 1975)

These considerations expanded into not just the percentage of land devoted to multi-family housing or apartments, but the housing capacity of land and its availability for development.
In Easttown Township, 0.95% of the land area was zoned for apartments and commercial; it was mostly developed for commercial uses. The Commonwealth Court found that land zoned for multi-family uses need not all be undeveloped land, but there must be the practical availability for that use or redevelopment. Therefore, the courts found the ordinance was exclusionary. *Waynesborough Corp. v. Easttown* 350 A.2d 895 (Pa. Cmwlth. 1976)

By 1977, the evaluation expanded to include comparisons of the potential development of multi-family dwelling with the existing number of residents and single-family homes in a community.

Warwick Township, Bucks County, zoned about 235 undeveloped acres (2.9% of the township’s land area) for a potential 2,000 new multi-family homes. This was about equal to the number of existing single-family homes in the township. Developers challenged that this was a token amount of land zoned for townhouses. The court focused on population and housing relationships as well as on the percentage of land designated for multi-family housing. The ordinance was upheld. *Warwick Land Development v. Warwick Township* 376 A.2d 679 (Pa. Cmwlth. 1977).

Also in 1977, the PA Supreme Court adopted a 3-pronged “Surrick Analytical Matrix” for the evaluation of fair share compliance that included both land area considerations and demographic factors. The matrix involved the following:

**First Part**
Is the township a logical area for development?
1. What is the proximity to a large metropolis?
2. What are the community’s and the region’s projected population growth figures?

**Second Part**
If the community is determined to be located within the path of growth, then the current level of development in the community should be examined:
1. Is this a fully developed community? Fully developed communities would not need to accommodate a fair share of the regional housing growth.
2. What is the population density?
3. What is the percentage of totally developed land?
4. What is the percentage of land available for multi-family dwellings?
Third Part

Based on the data compiled in the second part, the analysis shifts to an evaluation of the total percentage of land zoned for multi-family development to determine if it is disproportionately small in relation to the population growth pressures and present level of development. *Surrick v. Upper Providence ZHB.* 382 A.2d 105 (Supreme Court 1977)

The courts still seem to be working with an evaluation process that relied heavily on some percentage of land available for multi-family housing and coming to a conclusion on the adequacy to meet a future housing need. There was no study of what might be a reasonable proportion of the anticipated regional multi-family housing growth that might be allocated to the community. There was no detailed evaluation of the likely housing yield for the undeveloped areas zoned for multi-family housing. Comparing land area with housing need was comparable to comparing apples and oranges.

However, post-*Surrick* cases clearly indicated that the answer to the third part of the *Surrick* analysis would not be decided merely on the percentage of land zoned for multi-family housing development in isolation of a more thorough analysis of whether or not a particular ordinance does or does not meet a fair share obligation. It is likely the courts were provided with facts and data on the demographic aspects of these challenges, which increased and improved the material they could use in their deliberations.

Upper Southampton Township, Bucks County, was 25% undeveloped and 3.5% of its total land was zoned for multi-family development. The court further examined the percentage of housing in the township that was currently in multi-family (11%) and the percentage that could be multi-family (14%) if the undeveloped land were fully developed in accordance with applicable zoning. The township won seemingly on the strength of the numbers of multi-family units then built and those capable of being built under existing zoning. The message seems to be that it is important to demonstrate not just the amount of land zoned to permit such uses and the amount which remains to be developed, but also the number of units that can be accommodated. The ratio of existing singles to multi-family and the potential ratio are also important. *Appeal of Silver* 387 A.2d 169 (Pa. Cmwlth. 1978)

The zoning ordinance of Wrightstown Township, Bucks County, was challenged and, in 1978, the PA Supreme Court found in favor of the township based on a Surrick Analysis. Applying the analysis, the court found that the township was not in the path of growth. The court went on to address the percentage of land area available for multi-family housing based on the number of units that could be built.
in the multi-family district in comparison to the projected housing growth. The township had 40 acres out of a total of 6,491 zoned for multi-family development (0.62%). But the court compared the number of dwelling units that could be built in the 40 acres, which was 320, to the county housing plans projection of a need for 259 units by 1985. The Court said:

“The percentage of land available for multi-family needs is not to be considered in isolation ... Given the projected population figures for the township and the region, and more importantly the projected housing needs, it is apparent that Wrightstown ... more than provided for anticipated population growth.”

Although the percentage of land zoned for multi-family development was very small, it was more than adequate to accommodate the projected housing growth. As noted previously, townships with higher percentages of land zoned for multi-family use were found to be exclusionary. The early cases dealt with percentage of land available for multi-family use without a comparison of housing yield to projected housing growth. *Kravitz v. Wrightstown Township.* 395 A.2d 629 (PA. Cmwlth. 1978)

North Londonderry Township, Lebanon County, had 2.6% of the total township land area (almost 200 acres) zoned for multi-family housing at a density of 10 units per acre. The potential yield of 2,000 dwelling units more than accommodated a projected increase of 1,422 people through 1990. Although the percentage of land zoned for multi-family development was fairly small, it was sufficient to accommodate more housing units than the projected population growth. Again, demographic evidence was important in showing that the township had adequately prepared to accommodate growth. *Hostetter v. North Londonderry Township.* 437 A.2d 806 (Pa. Cmwlth. 1981)

These cases and others show the evolution from a simple and arbitrary percentage of land zoned for multi-family housing to a methodology focusing on a community’s or group of communities’ approach to addressing housing growth. These decisions considered comparisons of land needed for the anticipated housing growth to the potential housing yield of undeveloped, properly zoned land. Apples to apples.
In planning for Designated Growth Areas, it is important that sufficient land area be provided to accommodate an adequate amount of housing, which should include a variety of housing types suitable for higher density planning areas. Section 604(4) of the MPC talks about providing for “all basic forms of housing, including single-family and two-family dwellings, and reasonable ranges of multifamily dwellings in various arrangements, mobile homes and mobile home parks.” Good multi-municipal comprehensive plans will provide for a mixture of these housing types within the Designated Growth Areas.

How much is enough is another key question. A thorough analysis of how much land is needed to accommodate a fair share of the regional housing growth in comparison to the undeveloped land planned and zoned for these housing units is essential in preparing a well founded, defensible plan. As noted above, 0.7% of land zoned for multi-family housing in the Willistown case and 0.95% in the Easttown case was found to be inadequate. These cases rested on percentages of land area considerations. In the Wrightstown case, 0.62% was found to be adequate because the township’s testimony included a comparison of the housing capacity of the multi-family district to the projected housing growth.

In December of 2003, the Pennsylvania Supreme Court rendered a decision in favor of Upper Makefield Township, Bucks County, based in part on an analysis of projected housing growth and the adequacy of the undeveloped land in the multi-family zoning district. The Court included a description of a specific evaluation procedure the township, in conjunction with other partners in the Newtown Area Joint Municipal Planning Program, used in its original joint municipal comprehensive plan, two updates to that plan and in the expert witness testimony provided in defense of the planning and zoning.

This case is different from prior cases in that the adequacy of the land available for higher density housing was based on the fairly detailed comparison of anticipated housing growth for the specific planning period with the housing capacity of the undeveloped land in the appropriately zoned areas. Although the Court described the specific six-step process used in the Newtown Area Planning Program, the Court suggested that municipalities should have flexibility in how they address this issue. The 6-step process will be described in following paragraphs.

First, some background information would be helpful.
Facts of the Case

A group of eight property owners (“Dolington Land Group”) and Toll Bros. Inc. challenged the validity of a joint municipal zoning ordinance that covered Newtown Township, Upper Makefield Township and Wrightstown Township (the “jointure”) in Bucks County on two grounds:

1. Dolington Land Group and Toll Bros. argued that the ordinance violated Surrick’s fair share principle that requires municipalities in the path of growth to make provisions for multi-family, high-density housing. In addition, the developers argued that if even one jointure member was in the path of urban-suburban growth, all members should be subject to the Surrick test. As a number of “friends of the court” briefs noted, if the court adopted this argument, it obviously would spell the end of multi-municipal planning and zoning, because no rural or semi-rural municipality would want to enter into such an arrangement.

2. The developers also argued that the joint zoning ordinance’s Conservation Management Zone’s regulations imposed unreasonable limitations on property owners’ rights to use their land.

(Note that the ordinance, which was first enacted in 1983, was based on the MPC’s prior authorization for joint municipal zoning ordinances, not on the newer multi-municipal zoning sections of the MPC.)

Court’s Holding

1. A Surrick analysis was inapplicable because there was insufficient evidence from the lower court and hearing board proceedings that any of the municipalities were in the path of development. So the court left for another day the question of the proper application of the Surrick inquiry to a multi-municipal zoning ordinance.

However, in the Dolington opinion, the court did write approvingly about the housing allocation formula the jointure used, which provides insight into how the court might treat this issue in future decisions: “The periodic analytic process employed by the jointure’s planning commission, with the assistance and counsel of the county planning authorities and expert planners is, in our view, an entirely appropriate method for the municipality or multi-municipal jointure to meet its obligation to provide for the proportion of the regional need for high-density, multi-family housing fairly ascribed to it.”
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2. The court held that even though the Conservation Management regulations precluded development of 83% of the 292 acres of the development site, it did not unreasonably restrict landowners’ rights. It affirmed the holding of C&M Developers, Inc. v. Bedminster Township Zoning Hearing Board (2002), which will be described subsequently, that so long as the primary purpose of the agricultural preservation ordinance was to preserve farmland, the ordinance was presumptively valid. It also noted that preservation of wetlands, floodplains, slopes, and woodlands and agricultural soils, “can properly serve in an appropriate municipal or multi-municipal context as a legitimate justification for the imposition of carefully tailored restrictions of the type, design, location and intensity of permitted development.” The township’s standards were reasonable, flexible and appropriate for a rural zoning district, a district akin to a Rural Resource Area described in the MPC.

A Method for Fair Share Analysis

In its opinion, the Supreme Court described the six-step evaluation process that was used three times in the Newtown Area Jointure comprehensive plans to evaluate its ability to meet a fair share requirement. It was again used in the defense of the zoning ordinance in this challenge. The methodology is described in the following paragraphs. The Newtown Area calculations are included in the following box.

The Six-Part Dolington Analysis

Step 1. Choose a Planning Period

A reasonable time horizon for projections was selected. Section 1103(a)(1) of the MPC states that growth areas in a multi-municipal plan must be based on accommodating growth “within the next 20 years” at “residential and mixed use densities of one unit or more per acres.” Planning Beyond Boundaries, on page 3-12, advises “The 20 year time horizon is a standard long range time frame in planning practice. However, the plan can recognize that the accuracy of growth projections for 20 years cannot be reliably assessed and will be revisited at stated intervals – 5 years ideally or 10 years at the most. (Municipal and multi-municipal plans are required to be reviewed at 10 year intervals. Section 301(c).) In this way, projections would be kept current and reasonably useful and defensible for the coming 10 year period.” It is recommended that municipalities plan for a 10-year horizon and, in five years, reevaluate and extend for an additional 5-year period. In this way, the plan will remain current and responsive to changing conditions and circumstances.
The Newtown Area Joint Municipal Comprehensive Plan’s planning period was 2000 to 2010.

Step 2. Determine the Total Number of Projected Housing Units for the Planning Period

The total number of new housing units that can be reasonably anticipated for the selected planning period must be determined. The Newtown Area Planning Program relied on the housing projections published by the Delaware Valley Regional Planning Commission (DVRPC) and the Bucks County Planning Commission. The southeastern counties work with DVRPC to develop population forecasts that are disaggregated (allocated down to) to the counties. The counties, in turn, disaggregate them to the municipal level and convert the population projections to housing projections. Actually, three sets of population and housing projections were provided by DVRPC in the past. Each was based on various assumptions that resulted in a range of projections. In many planning programs, one set of projections will be available or developed and that would be adequate. In the Newtown Area Planning Program, the housing projections for the 2000 to 2010 period ranged from 2,060 to 2,640 units. As such, the projections used in that planning program (from the greater region to the county to the municipalities) truly represented a fair share of the regional housing growth.

If, for whatever reason the projections from the regional or county commissions are not suitable or appropriate for the multi-municipal planning group, projections would be calculated based on defensible methodology.

Where this information is not readily available from a reliable source, projections can be calculated using an accepted methodology, such as the cohort-survival technique.

It is always advisable to check the housing projections based on recent growth experience. In the accompanying exhibit box, the annual growth for the period from the federal census in April 1990 to the end of 1995 (5.75 years) and to the end of 1998 (8.75 years) showed recent growth rates were both below the middle projection series. Therefore, the housing projections for the Newtown Area were felt to be reasonably reliable, if not conservative.

Step 3. Determine the Portion Allocated for Multi-family Housing Growth

Some reasonable portion of the total projected housing growth should be allocated to multi-family, higher density units. The ratio of multi-family housing types from the most recent census is one source.
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A ratio from the municipal, county or regional housing plan is another. Actually, a review of all appropriate sources is the best procedure.

For the Newtown Area calculations, two sources were checked to evaluate what portion might reasonably be expected for multi-family housing. The Bucks County Office of Community Development prepared a Comprehensive Housing Assistance Strategy that recommended that 25.012 percent of new housing in the Newtown Area should be available for very low, low and moderate-income housing. However, the 2000 federal census reports that 32.9 percent of the county’s housing was in attached and multi-family types.

Low and moderate-income housing or attached and multi-family types? Which is the appropriate basis to use? PA courts have focused on housing types and land uses, not income measures. Although using percentages of housing types would provide the most suitable parameter, both parameters were checked in this evaluation, because the developer’s attorney tried to make an issue of income categories. The township’s witness, therefore, responded.

For the purposes of the planning and testimony, the higher percentage related to housing types was chosen in order to be consistent with Pennsylvania case law.

The total number of anticipated housing units was multiplied by 0.329 (the federal census ratio for attached or multi-family types). Therefore, between 678 and 869 multi-family housing units should be accommodated in the 2000 to 2010 period.

Step 4. Add a Safety Factor to the Projected Number of Multi-Family Dwellings

Many factors affect housing growth over time and it is judicious to add a safety factor to the housing projections.

In Step 3, the Newtown Area planners determined that between 678 and 869 multi-family units would be expected to be built in the 2000 to 2010 period. However, population and housing projections do not come from an exact science and it’s wise to incorporate some consideration for uncertainties. A 50 percent safety factor was added by multiplying the projected number of multi-family dwelling units by 1.5. Therefore, the projected number of multi-family dwellings, with the safety factor, would be between 1,017 and 1,304 units.
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Step 5. Determine the Dwelling Unit Capacity of the Undeveloped Properties in the Appropriate Zoning Districts

The usable land within the district or districts, which permit the development of multi-family dwellings, has to be identified. The first step is to compile a list of the properties that meet the minimum site area requirement for multi-family development. Since many development sites are comprised of assembled parcels, adjoining undeveloped properties, even if they might not meet the minimum site area requirement, should be included. If a single home or barn is located on any of these properties, that property should be considered available. Often, an existing building is removed or included in the development plan.

It is important to ensure that the properties are not constrained by features, such as wetlands or floodplains, so that they would be unusable or the maximum number of homes could not be achieved. If those conditions exist, either the property should not be considered developable or only the usable part of the property should be included in the calculations.

In a multi-municipal comprehensive plan, there will be several districts among the municipalities where multi-family development is permitted. The undeveloped land in each appropriate district needs to be inventoried.

It may be advisable to reduce the acreage by 10 to 15 percent to account for properties that may be used for non-residential uses, or some factor to adjust for road and utility rights-of-way, irregularly shaped properties and other factors that may affect the dwelling unit yield. Note that the capacity was not reduced in this exercise illustrated in the box.

In the Newtown example, there are 420.6 undeveloped acres in the R-2 District where multi-family development is permitted. Multiplied by the permitted maximum density (3.9 dwelling units per acre), there would be a capacity for 1,639 multi-family dwelling units.

Remember, we are trying to identify the multi-family dwelling units that could be built within the timeframe of the analysis. In many situations, there have been multi-family developments proposed, approved or underway with units yet to be constructed. It is reasonable to add onto the development capacity of the totally undeveloped parcels, the approved but unbuilt multi-family units. This information is usually available from the community codes office. Unbuilt units were not included in the Newt-
Step 6. Compare the Projected Number of Multi-family Dwelling Units with the Number that Could be Built in the Appropriate Zoning Districts

Finally, the anticipated housing growth would be compared to the planning capacity of the appropriately zoned areas.

In Step 4 of the Newtown Area example, it was determined that up to 1,304 multi-family dwelling units would be needed to accommodate the high projection for multi-family dwellings plus a 50 percent safety factor.

In Step 5, it was determined that the undeveloped land in the R-2 zoning district had a capacity of 1,639 multi-family dwelling units.

The capacity of the undeveloped land in the R-2 zoning districts would yield 335 more units than needed to accommodate the high projection for multi-family dwellings plus a 50 percent safety factor.

As such, the R-2 zoning district’s capacity is 25.7 percent greater than needed to accommodate the high projections for multi-family dwellings plus a 50 percent safety factor. Therefore, more than sufficient land is available for multi-family development.
Adapted from an exhibit used in the Dolington Land Group and Toll Bros. Substantive Challenge to the Newtown Area Joint Municipal Zoning Ordinance

COMPARISON OF THE NUMBER OF PROJECTED MULTI-FAMILY DWELLING UNITS WITH THE DWELLING UNIT CAPACITY OF THE DEVELOPABLE PROPERTIES IN THE R-2 ZONING DISTRICT

Step 1 Choose a Planning Period

The time horizon is 2000 to 2010.

Step 2 Determine the Total Number of Projected Housing Units 2000 to 2010

Combined Housing Projections for Newtown, Upper Makefield and Wrightstown Townships

<table>
<thead>
<tr>
<th>Projection Series</th>
<th>2010</th>
<th>2000</th>
<th>Increase</th>
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<tr>
<td>Low Series</td>
<td>14,030</td>
<td>11,970</td>
<td>2,060</td>
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<tr>
<td>Middle Series</td>
<td>14,560</td>
<td>12,270</td>
<td>2,290</td>
</tr>
<tr>
<td>High Series</td>
<td>15,050</td>
<td>12,410</td>
<td>2,640</td>
</tr>
</tbody>
</table>

Sources: BCPC: 91:MP-8B
Bucks County Planning Commission Housing Projections May 1993

Check the Growth Rate against the Estimated Housing Growth

Combined Estimated Housing Growth for Newtown, Upper Makefield and Wrightstown Townships for the following time periods:

- 1990 to 1995 – Used in the Comprehensive Plan of 1997 (5.75 years),
- 1990 to 1998 – Most Recent Estimate (8.75 years)

Increase 1990 to 1995

\[
\frac{1,230}{5.75 \text{ years}} = 213.91 \text{ units/year} \\
213.91 \text{ units/year} \times 10 \text{ years} = 2,139 \text{ units in a 10-year period}
\]

Increase 1990 to 1998

\[
\frac{1,764}{8.75 \text{ years}} = 201.6 \text{ units/year} \\
201.6 \text{ units/year} \times 10 \text{ years} = 2,016 \text{ units in a 10-year period}
\]

Both estimates would fall below the middle projection series.

Sources: BCPC 95:MH-3B
BCPC 98:MH-3B

Step 3 Determine the Portion of the Total Number of Projected Housing Units That Are Anticipated for Multi-family Housing Units for the 2000 to 2010 Period

In the Comprehensive Plan of 1997, 25.012 percent was used based on the proportion estimated for very low, low, and moderate income households as used for the Newtown Planning Area in the Bucks County Office of Community Development’s Comprehensive Housing Assistance Strategy.

According to the 1990 Federal Census, 32.9 percent of the Bucks County housing stock was in attached and multi-family types.

The higher factor, 32.9 percent, was used in this evaluation.

Continued on next page
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<table>
<thead>
<tr>
<th>Projection Series</th>
<th>Increase</th>
<th>Ratio</th>
<th>Multi-family</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low Series</td>
<td>2,060</td>
<td>x 0.329</td>
<td>= 678</td>
</tr>
<tr>
<td>Middle Series</td>
<td>2,290</td>
<td>x 0.329</td>
<td>= 753</td>
</tr>
<tr>
<td>High Series</td>
<td>2,640</td>
<td>x 0.329</td>
<td>= 869</td>
</tr>
</tbody>
</table>

### Step 4 Add a Safety Factor

As recommended by the Bucks County Planning Commission and included in the Newtown Area Comprehensive Plan of 1997, a 50 percent safety factor was added to account for various uncertainties.

<table>
<thead>
<tr>
<th>Projection Series</th>
<th>Multi-family</th>
<th>Safety</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Units</td>
<td>Factor</td>
<td>Units</td>
</tr>
<tr>
<td>Low Series</td>
<td>678</td>
<td>1.5</td>
<td>1,017</td>
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<tr>
<td>Middle Series</td>
<td>753</td>
<td>1.5</td>
<td>1,130</td>
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<tr>
<td>High Series</td>
<td>869</td>
<td>1.5</td>
<td>1,304</td>
</tr>
</tbody>
</table>

### Step 5 Determine the Dwelling Unit Capacity of the Undeveloped Properties in the R-2 Zoning District

Multiply the acreage of undeveloped parcels by the maximum density of the R-2 district to determine the potential dwelling unit yield. If multi-family dwellings are permitted in other zoning districts, include those parcels, the acreage and multiply by the permitted density.

<table>
<thead>
<tr>
<th>Municipality</th>
<th>Parcel Number</th>
<th>Acres</th>
<th>Density</th>
<th>Dwelling Unit Capacity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newtown</td>
<td>29-10-55</td>
<td>31.924</td>
<td>x 3.9</td>
<td>= 124</td>
</tr>
<tr>
<td></td>
<td>29-10-52-2</td>
<td>27.513</td>
<td>x 3.9</td>
<td>= 107</td>
</tr>
<tr>
<td></td>
<td>29-9-3-1</td>
<td>19.2</td>
<td>x 3.9</td>
<td>= 75</td>
</tr>
<tr>
<td></td>
<td>29-9-7</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Upper Makefield</td>
<td>47-9-43</td>
<td>30.7385</td>
<td>x 3.9</td>
<td>= 120</td>
</tr>
<tr>
<td></td>
<td>47-9-32</td>
<td>33.79</td>
<td>x 3.9</td>
<td>= 131</td>
</tr>
<tr>
<td></td>
<td>47-20-8 (part)</td>
<td>84.5</td>
<td>x 3.9</td>
<td>= 330</td>
</tr>
<tr>
<td></td>
<td>47-8-16</td>
<td>32.226</td>
<td>x 3.9</td>
<td>= 125</td>
</tr>
<tr>
<td>Wrightstown</td>
<td>53-1-61</td>
<td>58.62</td>
<td>x 3.9</td>
<td>= 229</td>
</tr>
<tr>
<td></td>
<td>53-1-59</td>
<td>23.14</td>
<td>x 3.9</td>
<td>= 90</td>
</tr>
<tr>
<td></td>
<td>53-1-89</td>
<td>78.955</td>
<td>x 3.9</td>
<td>= 308</td>
</tr>
<tr>
<td>Totals</td>
<td></td>
<td>420.6065</td>
<td></td>
<td>1,639</td>
</tr>
</tbody>
</table>

### Step 6 Compare the Projected Number of Multi-family Dwellings for the 2000 to 2010 Period with the Number of Multi-family Dwelling Units That Could Be Developed in the R-2 Zoning District

In Step 4, it was determined that 1,304 multi-family dwelling units would be needed to accommodate the high projection for multi-family dwellings plus a 50 percent safety factor.

In Step 5, it was determined that the undeveloped land in the R-2 zoning district had a capacity of 1,639 multi-family dwelling units.

The capacity of the undeveloped land in the R-2 zoning districts would yield 335 more units than needed to accommodate the high projection for multi-family dwellings plus a 50 percent safety factor.

As such, the R-2 zoning district’s capacity is 25.7 percent greater than needed to accommodate the high projections for multi-family dwellings plus a 50 percent safety factor. There is more than sufficient land available for multi-family development.
Other Methods

In *Dolington Land*, the Supreme Court said there should be flexibility in the way the *Surrick* analysis should be applied in “fair share” challenges. The methodology noted above is not the exclusive way cooperating municipalities might approach planning to accommodate a fair share of the regional multi-family housing growth. The following paragraphs provide another example of how another planning commission has addressed this important fair share matter. The methodology is based on the *Surrick* analysis, sound planning principles, and an extensive analysis of data that allows for reasonable conclusions to be drawn. The Chester County Planning Commission’s methodology has been included to offer the reader an alternative approach and to demonstrate that there is indeed more than one way to assess whether a municipality or region is meeting its responsibility to allow for its fair share of residential housing types, particularly multi-family housing.

It should be understood that the following fair share methodology, devised in the early 2000s and used by the Chester County Planning Commission, has not been challenged in a court of law and, therefore, no definitive claims can be made to its reliability in withstanding such a challenge.

Chester County’s fair share methodology is based on a consistent framework but is readily adjusted for a variety of land use scenarios. The municipalities in Chester County range from rural agricultural communities to suburban ones and, therefore, the methodology is adjustable to account for those differences. The following fair share synopsis is from the Octorara Regional Comprehensive Plan. The Octorara Region, comprised of six municipalities, two boroughs and four townships in the western part of Chester County, is an agricultural area and, therefore, the fair share analysis contains calculations that would not be appropriate (such as deducting active agricultural land from the developable lands total) for a more suburban or urban area.

The *Dolington* fair share analysis was based on zoning standards. The Octorara Region fair share analysis was conducted based on the future land use categories in the Octorara Regional Comprehensive Plan (2004), not zoning districts or densities (albeit the land use categories are somewhat loosely based on a composite of the region’s individual zoning ordinances). See the Octorara Plan for the full fair share analysis.

Chester County’s fair share methodology is laid out in three tiers following those in *Surrick*. There are, in addition, “factors” in Tier 2 that are essential subparts to the analysis. They are labeled as such.
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Tier 1: Path of Growth - Is the Region in the Path of Growth?
Based on the region’s proximity to Lancaster and Exton, as well as Newark and Wilmington, Delaware, and connections to major transportation destinations via Route 41, Route 30, and the Pennsylvania Turnpike (I-76), as well as the projected population figures from the 2000 Census and Chester County Planning Commission projections, development history, and growth patterns, the Octorara Region is located in the path of growth.

Tier 2: Present Level of Development - Is the Region a Developed or Developing Community?
Several key factors help determine the present level of development:

- Factor A: The percentage of remaining undeveloped land;
- Factor B: The percentage of housing units available for multi-family dwellings; and
- Factor C: The percentage of land available for the development of multi-family dwellings.

Factor A: Remaining Undeveloped Land
Of the region’s total acreage, almost 52% is developable. Constrained, protected and developed lands are excluded from developable lands. The amount of developable land remaining indicates that the region is not close to build-out and, therefore, the region must continue to accommodate additional housing units, including multi-family housing units.

Factor B: Housing Units Available for Multi-Family Housing
Three specific subsets of information, Factors B.1 to B.3, are considered in this part of the analysis.

Factor B.1: Existing Multi-Family Units
As of 2000, 9% of the total housing stock in the region consists of multi-family units. As expected, the boroughs contain most of the multi-family units in the region. This percentage provides an historical assessment of multi-family development to date.

Factor B.2: Projected Housing Unit Needs
Based on estimated population projections, an additional 919 housing units will be needed to accommodate the expected population growth to the year 2020, the plan’s time horizon. A review and analysis of case law indicates that, of those 919 units, approximately 15% or 138 units should potentially be multi-family units. With a potential for over 5,000 new multi-family units under the land use plan, the regional plan easily meets this criteria.
The 15% for the Octorara Region is based on planning principles derived from a reading of case law. The same percentage is not necessarily recommended for every community, and it is not relevant to the percentage recommended as an acceptable percentage of multi-family units at build-out (see Factor B.3 below), rather it is a target for the region as it pertains to the on-going responsibility to allow for multi-family units while approaching build-out.

Factor B.3: Multi-Family Units Possible at Build-out

This part of the analysis considers multi-family units as a percentage of housing stock on the ground at build-out, taking into account the existing number of multi-family units already in the region. If between 15 to 20% of the units at build-out could potentially be multi-family, the region is considered to be meeting its fair share of multi-family housing. Looking at the existing multi-family development in addition to what is possible under the future land use plan categories provides a more realistic picture of how the region could look at build-out, and how much multi-family housing the region ultimately allows for.

In terms of acceptable levels of multi-family housing units, case law has upheld 12 to 14% of total housing units in townships nearing build-out and around 30% of total housing units in boroughs nearing build-out. There has been no holding on what percentage of multi-family housing might be appropriate for a region comprised of both townships and boroughs.

Because of the agricultural character of the region, this analysis considers two scenarios: one where agricultural land is considered “developed” and a second where agricultural land is considered undeveloped and available for future development.

- Excluding the region’s Agricultural Preservation land use category, 52% of the future housing units could potentially be multi-family housing at build-out. In this estimate, the Agricultural Preservation category is factored out of the equation because it is classified as “developed” land. (52% = 5,554 current and potential multi-family units divided by 10,676 current and potential total units)
- Including the region’s Agricultural Preservation land use category, 50% of the total housing units in the region could potentially be multi-family housing at build-out. This estimate considers all developable lands. (50% = 5,554 current and potential multi-family units divided by 11,195 current and potential total units)

Under both scenarios, the region exceeds the 15 to 20% criteria for total percentage of multi-family units on the ground at build-out.
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Factor C: Land Available for Multi-Family Housing

The final factor in analyzing the present level of development is the amount of land available for multi-family dwellings. Because the courts have not specifically defined the term “available” as used in Surrick and its progeny (developable lands only/redevelopment possibilities/total land), both developable lands and total lands are considered in the analysis (Factors C.1 and C.2). Chester County recommends that a minimum of 5% of developable lands and a minimum of 7% of total lands be designated for multi-family development. The recommended percentages contain a “safety factor” (the percentages are higher than several of those upheld by the courts to date) to attempt to insulate the region from being susceptible to challenge.

Factor C.1: Developable Lands

Developable lands are considered from two perspectives: all developable lands and developable lands excluding the Agricultural Preservation land use category. These perspectives are most relevant in rural settings and less developed suburban areas where there is little existing multi-family development. Based on a review of relevant case law, it is recommended that a minimum of 5% of developable land be designated for multi-family uses.

All Developable Lands: Percentage of developable land designated for multi-family use. Based on the region’s analysis, 7% of developable land is designated for multi-family use. This exceeds the minimum target of 5%.

Developable Lands Excluding Agricultural Preservation Land Use Category: Percentage of developable residential land excluding agriculture, designated for multi-family use. Based on the region’s analysis, 36% of residential developable land is designated for multi-family housing. This exceeds the minimum target of 5%.

Factor C.2: Total Lands

This part of the analysis considers the percentage of all land, whether developed or not, designated for multi-family use. This approach is more relevant in more highly developed suburban or urban areas. Based on a review of relevant case law, it is recommended that a minimum of 7% of all land be designated for multi-family uses. The region’s analysis indicates that 9% of all land is designated for multi-family use. This exceeds the recommended minimum target of 7%.
Tier 3: The Extent of Any Exclusion - Is the amount of land available for multi-family development disproportionately small in relation to population growth pressure and present level of development?

The first two tiers of the three-tier fair share test indicate that the region is a logical area for development and population growth and that there is much more room for development (it is approximately 52% developable). The data in the Tier 2 analysis demonstrates that the region, by future land use category, can provide more than enough housing units, both total and multi-family, to meet the projected population needs. The possible numbers of multi-family units at build-out are greater than the total number of all types of residential units as of the 2000 Census. In addition, the region provides 7% of all of its developable lands, as well as 9% of its total land for multi-family development. The Octorara Region is still very rural, and through planning measures the region has taken steps to protect its agricultural heritage and tradition. In spite of this, the region provides a reasonable amount of developable land for multi-family development.

Summary of Fair Share Analysis and Conclusion

Tier 1: Is the Octorara Region in the path of growth?
Yes. Based on proximity to metropolitan areas, major transportation routes, past development history, and population projections, the region is in the path of growth.

Tier 2: Present Level of Development

Factor A: Is the Octorara Region a developing community?
Yes. 52% of the land is still available for development.

Factor B: Does the region allow for an adequate number of multi-family units?

Factor B.1: As of 2000, 9% of the total housing stock in the region consists of multi-family units.

Factor B.2: Do Future Land Use categories allow for projected multi-family units for the next 10 to 20 years?
Yes. Of the total 919 projected units needed, 138 units should potentially be multi-family and 5,150 multi-family units are possible. (Recommended minimum 15% of all projected units.)

Factor B.3: Do Future Land Use categories allow for an adequate percentage of multi-family units on the ground at build-out (including existing multi-family units)?
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Yes. 50% of total units could be multi-family units at build-out and 52% of total units could be multi-family units at build-out excluding agricultural preservation land use category.
(Recommended minimum 15-20% of all units at build-out.)

Factor C: Does the region designate an adequate amount of land for multi-family use?
Yes. The developable land target for multi-family use is 5% and the region allows for 7%. If the Agricultural Preservation category is considered “developed”, 36% of the region’s developable land allows for multi-family development. (Factor C.1) The total land target for multi-family use is 7% and the region allows for 9%. (Factor C.2)

Tier 3: Is the amount of land available for multi-family development disproportionately small in relation to growth pressure and present level of development?
No. Based on the Tier 1 and Tier 2 analyses, there is adequate opportunity for multi-family development in the Octorara Region.

Clues from Dolington Land

In its decision in the Dolington Land case, the Supreme Court noted a number of community planning methods that the justices thought resulted in reasonable approaches to planning for housing in a municipality or group of cooperating municipalities. These are not principles of law. However, they might be considered recommendations, clues or indications of how this group of Supreme Court justices would likely evaluate similar matters in the future.

Not all municipalities may be in the “Path of Growth.” 10,000 Friends of Pennsylvania and others filed amicus curiae (friend of the court) briefs that challenged the developer’s contention that, if a rural municipality participates in a multi-municipal planning program and other parts of the jointure are within the “path of growth,” then the entire land area of the jointure should be considered in the “path of growth.” These briefs argued that a judicial decision upholding that premise would be disastrous to all future multi-municipal planning efforts. The Supreme Court noted that the 2000 MPC amendments were not intended to influence or change the “path of growth analysis,” but to alter the rule that every municipality needed to provide for every lawful use within each municipality’s geographic boundary. These are clearly different issues.

Farmland may be considered developed land. The developer argued that, when determining the amount of land available for development, prime agricultural land under active cultivation should be considered
“undeveloped land” available for housing and building purposes. 10,000 Friends’ position was that this land was already “developed” in its highest and best use, and should not be considered “available” for future development. Although the Court’s decision did not turn on this point, the Court acknowledged the importance of protecting prime agricultural lands by way of zoning restrictions.

*Prime agricultural soils are important resources.* The court rejected the contention that prime agricultural soils are less deserving of zoning protection than other sensitive environmental lands and resources, such as wetlands, floodplains, floodplain soils, steep slopes and mature woodlands. However, the Court cautioned that regulations designed and intended to preserve agricultural land, while serving a laudable purpose, may in some instances too severely, or indiscriminately, restrict landowners’ rights, and thereby, exceed the municipalities’ lawful powers. See the following description of the Supreme Court’s *C&M* decision.

*Municipalities should employ a periodic analytic process.* The Supreme Court liked the idea that the Newtown Jointure evaluated the need for multi-family housing several times over the years that the municipalities had worked together. The court wrote:

> “The periodic analytic process employed by the jointure’s planning commission with the assistance and counsel of the county planning authorities and expert planners, is, in our view, an entirely appropriate method for a municipality or multi-municipal jointure to meet its obligation to provide for the proportion of the regional need for the higher density, multi-family housing fairly ascribed to it. Implemented conscientiously and in good faith, this method will insure that land is available for development of an appropriate variety of housing types on a continuous basis.”

From the court’s decision, it seems clear that planning for housing must be an on-going process and based on rational and defensible methodologies. It also affirms that municipalities have to plan for a reasonable portion of the regional housing growth that may be ascribed to it by planning agencies that have a broader county or regional perspective.

*Surrick Analysis and other relevant factors are important.* The Court commented on the three-step *Surrick* analytical process. The court said that during the intervening 25 years since the *Surrick* decision, “factors previously of little or no concern have assumed preeminence.” The Court opened the door to consideration, as part of the *Surrick* analysis of “an increased awareness of the environmental sensitivity and pub-
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lic value of undisturbed wetlands, floodplains, slopes, and woodlands; the growing national and state-wide awareness of the true costs of sprawl and the need to implement contrary land use policies; the growing recognition of the importance of agricultural lands and activities and of prime agricultural soils.”

The Court concluded that “each of these factors acts to counterbalance to some extent the desire for intense development and each of these factors can properly serve in an appropriate municipal or multi-municipal context as a legitimate justification for the imposition of carefully tailored restrictions of the type, design, location and intensity of permitted development.”

The Court cited Governor Tom Ridge’s executive order No. 1997-4 which created the 21st Century Environmental Commission, as well as the commission’s September 1998 report, which identified sprawl and the need to create sound multi-municipal land use policies as the most pressing environmental issue facing the Commonwealth.

*Fair Share Evaluation: More than a “Snapshot in Time.”* In reviewing the Jointure’s compliance with the *Surrick* test, the Court said that the answer to that question “requires more than a numerical ‘snapshot’ comparison of available land and projected need on a particular day chosen by the challenger. Instead, an examination of the conduct of the governing bodies in the administration of their zoning enactments over time must be conducted.” The Court said “An examination of the conduct of the governing bodies in the administration of their zoning enactments over time must be conducted.”

As for the “numerical comparison of available land and projected need,” the Court said, “We emphasized in *Surrick* that the enumeration of factors we there compiled as relevant to the issue of zoning ordinance validity ‘in no way comprises an exhaustive list. Nor is any one factor necessarily controlling. We anticipate that zoning boards and governing bodies, in the exercise of their special expertise in zoning matters, will develop and consider any number of factors relevant to the need for and distribution of local and regional housing’.”

*Non-residential Development Fair Share*

Similar to the provision for residential uses, multi-municipal planning programs must make provisions for commercial and industrial uses through the zoning ordinance of the participating municipalities. However, the courts have treated commercial and industrial uses a bit differently from residential uses
in exclusionary zoning challenges. In his *Pennsylvania Zoning Law and Practice*, Robert Ryan explains that the courts have granted greater protection to residential uses and that it would be difficult to imagine a “fair share” of every type of industrial and commercial use.

He goes on to note that, “Even if a ‘fair share’ attack on an ordinance which permits an industrial or commercial use were theoretically possible, the cases give it very little chance for success.” Here are examples (See also page 7-5):

In one case, the 1% of the Lower Makefield Township’s land area devoted to commercial uses was challenged as “tokenism.” The Commonwealth Court upheld the zoning ordinance and noted that challenges involving the exclusion of commercial uses can seldom be sustained on the basis of the land percentage alone without an analysis of the present and projected needs of the municipality. *Sullivan v. Board of Supervisors of Lower Makefield Township* 348 A.2d 464 (Pa. Cmwlth. 1975)

In another example, a challenger took issues were that the Montgomery Township’s store size limit of 6,500 square feet excluded “big box” commercial uses and that 2.1% of the township’s land area zoned for commercial use did not provide for its “fair share.” The Commonwealth Court rejected both contentions and held that, as long as the township provided for commercial uses, it did not have to provide for all variations of commercial uses. *Montgomery Crossing Associates v. Township of Lower Gwynedd* 758 A.2d 285 (Pa. Cmwlth. 2000)

Baldwin Borough permitted telecommunication towers in less than 0.5% of the community’s total land area. The Commonwealth Court found that this was not a *de facto* exclusion. *Robert Macioce and Pittsburgh Cellular Telephone Co. v. The ZHB of the Borough of Baldwin*. ___ A.2d ___ (Pa. Cmwlth. 2004).

**PLANNING FOR FUTURE GROWTH AREAS**

Future Growth Areas are defined in the MPC as “An area of a municipal or multi-municipal plan outside of and adjacent to a designated growth area where residential, commercial, industrial and institutional uses and development are permitted or planned at varying densities and public infrastructure services may or may not be provided, but future development at greater densities is planned to accompany the orderly extension and provision of public infrastructure services.”
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MPC Section 1103(2) offers limited guidance of what these areas should be. “Designate potential future growth areas where future development is planned for densities to accompany the orderly extension and provision of services.”

This idea of coordination of Public Infrastructure Services with more intensive residential and nonresidential development is key to the change from a Future Growth Area to a Designated Growth Area. The timing, location and intensity of Designated Growth Areas should be based on the availability of a full range of services and facilities that support more intensive development. In planning jargon, this is called “concurrency.” Needed services should be in place before or provided concurrently with more intensive development.

Importantly, it should not be construed that services and facilities have to be provided everywhere or provided on demand. However, it does suggest that services and facilities should be provided to the Designated Growth Areas, planned for Future Growth Areas and avoided in the Rural Resource Areas, except in villages. Land use planning and facilities planning go hand-in-hand.

Future Growth Areas would be those locations where, for the foreseeable future, a comprehensive list of services does not exist and where land is not needed to accommodate the nonresidential development and the anticipated housing growth, as described previously. In time and as needed, Future Growth Areas may be converted to Designated Growth Areas. In contrast, Rural Resource Areas would not be converted to Future Growth Areas due to their resources, characteristics and constraints.

Remember the Supreme Court held that a “periodic analytic analysis was an entirely appropriate method” to plan for housing. Before the areas intended to accommodate higher density multi-family housing (residential portions of the Designated Growth Area) are built out, it would be important to consider an expansion of the Designated Growth Areas. Where and when might a Future Growth Area be converted to a Designated Growth Area? There are several planning considerations that may be used to help make that decision:

- Expansion areas should be adjacent to the current Designated Growth Areas.
- A survey of the area should show that there are no wide-spread natural features that would affect or be affected by more intensive development. Areas with significant floodplains, floodplain soils, wetlands, steep slopes, woodlands, unique habitats, hazardous geology and other limiting features should not be converted to Designated Growth Areas.
Areas with important historic or cultural resources should not be converted unless those resources can be preserved and enhanced.

Areas with natural scenic values should not be a top priority for conversion.

Consideration should be given to the community’s Official Sewage Facilities Plan under Act 537.

Orderly, efficient and cost effective extension of both public water supply and stormwater management facilities should be reviewed.

Capacity and safety considerations of the state and local road systems should be evaluated.

Penn DOT’s 12-Year Capital Improvements Plan and any municipal highway improvements plans should be reviewed.

School district officials should be contacted to determine if there is capacity in any of the existing school facilities or if there are plans for expansions or new buildings. Efforts should be made to minimize the need for busing and the distance kids would be bussed. Cost considerations should attempt to minimize negative tax impacts.

Public parks, passive recreation areas, playgrounds and athletic fields should be considered.

For new residential development, convert projected/forecasted population to projected/forecasted housing units to the needed land area. Remember to add a 50% safety factor.

For nonresidential developments, proximity to compatible and supporting land uses should be considered.

**PLANNING FOR RURAL RESOURCE AREAS**

Again, a Rural Resource Area is defined as “An area described in a municipal or multi-municipal plan within which rural resource uses including, but not limited to, agriculture, timbering, mining, quarrying and other extractive industries, forest and game lands and recreation and tourism are encouraged and enhanced, development that is compatible with or supportive of such uses is permitted and public infrastructure services are not provided except in villages.”

Section 1103(3) goes on to describe the areas as where:

- Rural resource uses are planned for.
- Development at densities that is compatible with rural resource uses are or may be permitted.
- Infrastructure extensions or improvements are not intended to be publicly financed by municipalities, except in villages, unless the municipalities agree that such services should be provided to an area for health and safety reasons or to accomplish one or more of the purposes stated in Section 1101 of the MPC.
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It seems fairly clear that the legislature envisioned Rural Resource Areas differently from Designated Growth Areas in terms of uses, densities and community services and facilities.

However, the courts have not abandoned their role as protectors of landowners’ rights. The task for the drafters of a multi-municipal comprehensive plan is to develop the implementing zoning regulations that protect agriculture, natural areas, groundwater resources, critical habitats and rural character while permitting reasonable use of property. It is a delicate balance that should be focused on avoiding...or prevailing in ...an ordinance challenge based on confiscation or “takings” grounds. What standards are reasonable? What might be too restrictive or severe?

First, we look to the legislature for guidance. For Designated Growth Areas and Villages, the MPC talks about densities of one unit to the acre or more. But for Rural Resource Areas, what are “densities that are compatible with rural resource uses?” It appears that the legislature could not or chose not to directly address this matter and left it to the courts to resolve.

Therefore, we look to the courts. In the past, the courts have said that no minimum lot size is unconstitutional per se. Each matter will be resolved on a case-by-case basis. In general, the track record is not supportive for larger lot size requirements. In many cases, but not all, the courts have not supported minimum lot area requirements greater than two acres for residential uses. The courts clearly saw that two and three-acre minimum lot area requirements do not protect good farm soils or agricultural activities. Nor do they ensure groundwater will not be polluted by on-lot septic systems. And “community character” is too subjective to provide a rationale for large lot area requirements. In a few cases, large lot area requirements and sliding scale methods, in truly bona fide agricultural communities, have been upheld.

Two recent Pennsylvania Supreme Court decisions provide guidance to zoning standards that have been found to be acceptable and those that have been found to be too restrictive.

Comparison of C&M v. Bedminster ZHB and Dolington and Toll Bros. v. Upper Makefield


Facts of the Case

C&M Developers, Inc. was equitable owner of several properties totaling 233.67 acres. The title owners would retain 33.77 acres and C&M would develop 199.9. The properties were located in Bedminster's
Agricultural Protection (AP) District. C&M read the zoning ordinance as permitting planned residential developments (PRDs) in the AP district. The township contended PRDs were permitted only in its R-3 high density district. C&M filed multiple challenges before the board of supervisors and the zoning hearing board on multiple issues. One challenge was withdrawn. Several challenges based on the exclusion of multi-family housing and the fair share/path of growth issue were consolidated and were won by the township in Commonwealth Court. One challenge on the reasonableness of the AP district standards was won by the township through the Commonwealth Court. However, the Supreme Court agreed to hear this case and reversed the Commonwealth Court’s decision.

The zoning standards were intended to protect agricultural soils, facilitate farming and provide low density residential use on approximately half the site. On properties of 10 acres or less, the minimum lot area requirement was 80,000 square feet, a little less than 2 acres. On properties greater than 10 acres, 60 percent of the prime farmland soils and 50 percent of the soils of state-wide or local importance had to be “set aside.” On the developable portion of the tract, the minimum lot area was one acre (43,560 sq. ft.). This had to be “one clear acre” which contains no watercourses, floodplains, floodplain soils, wetlands, lakes or ponds. Woodlands, steep slopes, agricultural soils that are not protected may be included in the “one clear acre.” In addition, a 10,000 square foot building envelope within the “one clear acre” was required. The building envelope would not include setbacks and protected natural features.

Court’s Holding

The Supreme Court agreed that, pursuant to its police power, the township may use zoning regulations to preserve agricultural lands and activities. However, the court found that, although the township intended to achieve a reasonable balance between agricultural land protection and the owner’s rights to use property, it failed to obtain that reasonable balance. The one acre minimum lot area requirement, in particular the “one clear acre” provision and the township’s interest in avoiding large houses on small lots in the AP district, resulted in an exclusionary purpose and unreasonably restricted the property rights of landowners. The agricultural standards of the ordinance were upheld by the court; the development standards were not.
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Appeal of Dolington Land Group and Toll Bros. Inc. from the Decision of the ZHB of Upper Makefield Township. 839 A.2d 1021 (PA Supreme Court. 2003)

Facts of the Case

Developers filed a two pronged challenge to the zoning ordinance, as described previously. In the first, based on the fair share issue, both the Commonwealth and Supreme Courts upheld the ordinance, as noted previously. The second challenge was based on the reasonableness of the zoning standards of the Conservation Management Zoning District (CM). Under the ordinance, 90% of Class I ag soils, 85% of Class II and 80% of Class III soils had to be protected along with percentage protections of other natural features.

The CM district standards permitted three types of residential development, described below, that permitted increased density with an increased portion of the site set aside for protection.

Court’s Holding

The Supreme Court upheld the zoning ordinance. The court said the standards primarily control the development’s layout and design, rather than its dwelling unit yield. With density incentives, the regulations also strongly encourage the use of cluster subdivisions and performance subdivisions where a site has significant natural constraints or agricultural soils. In contrast, the Court cited Bedminster’s mix of requirements, including the minimum lot area requirement of one acre and the “one clear acre” requirement, reduced the permitted density and housing yield.

The Court compared the Upper Makefield standards with Bedminster’s standards, as it discussed in the C&M opinion, and found that Upper Makefield’s protected prime farmlands and environmental features while it provided the landowner with reasonable options for development.

After the application of the agricultural soils and natural resource protection standards, a developer has 3 options for development of the site. Under a conventional single-family subdivision option, single homes on 1-acre lots can be developed at a density of 0.3 dwelling units per acre (DU/AC). Alternatively, a cluster of single homes on 20,000 square foot lots may be developed at 0.47 DU/AC. Finally, under a Performance Subdivision option, singles on 10,000 square foot lots, village houses (smaller lot singles) on 6,500 square foot lots and twins on 4,500 square foot lots can be developed at 0.6 DU/AC. The density is calculated on the base site area, which is the total site area minus road and utility rights-of-way.
The court recognized that, on a severely constrained site, the maximum density might not be achievable, but acknowledged that would result from the site’s features, not the constraints of the ordinance.

The court noted that 88 conventional single-family lots theoretically could be subdivided on the Dolington property, but only 30 lots were achievable given the topography and other natural constraints, access needs and on-lot sewage matters. Theoretically, 138 single-family cluster subdivision lots could be had, but only 69 lots were able to be established. But of the 176 possible performance subdivision lots, the full 168 lots could be developed. The court noted that this is more than 95 percent of the maximum calculated yield while meeting the agricultural soils and natural resource protection requirements.

The court noted approvingly that the township’s ordinance merely controls the layout of the development in order to preserve large areas of prime agricultural soils and sensitive natural features and has “no necessary impact on the maximum number of permitted dwelling units.”

**Services and Facilities in Rural Resource Areas**

The availability of public services and infrastructure facilitates development. As defined in MPC Section 107, a Rural Resource Area is one where public infrastructure services are not provided except in villages and Section 1103(3), Rural Resource Areas are areas where “Infrastructuur extensions or improvements are not intended to be publicly financed by municipalities, except in villages, unless the participating or affected municipalities agree that such service should be provided to an area for health or safety reasons or to accomplish one or more purposes set forth in Section 1101.”

What is meant by the phrase “publicly financed by the municipality” as stated in Section 1103(3) of the MPC? In many places, developers provide the funds to the municipality to expand water and sewer systems. In other places, a joint or regional authority or a county department may own and operate water and sewer systems. Would these other financing and ownership considerations fall under the term “publicly financed by the municipality”? What about the school district’s financing of the public school system? That’s publicly financed, but not by the municipality. The intent to avoid premature extension of services is not clear when the phrase “publicly financed by the municipality” is used in the legislation. Does the MPC suggest that the extension of services and facilities financed by an entity other that the municipality is appropriate even if it fosters premature or inappropriate growth in the Rural Resource Areas? This is another issue for the courts to resolve.
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PLANNING FOR “OLDER PENNSYLVANIA” COMMUNITIES

Although MPC Section 1103 does not address “Older Pennsylvania Communities” as it does for Designated Growth Areas, Future Growth Areas and Rural Resource Areas, the definition of Designated Growth Area in Section 107 says that a Designated Growth Area “preferably includes and surrounds a city, borough or village.”

The participation of a city or borough in a multi-municipal planning program can be advantageous for both the “older communities” and “newer communities.” Often, there are undeveloped properties, underdeveloped properties or properties that should be redeveloped in these “older communities” where the jointure can direct development. The conversion of farmland and the premature extension of urban services and developed uses may be avoided or postponed. As such, the move of shops, offices, industries and institutions from these “older communities” may be avoided along with the exodus of residents and tax revenues.

Having cities and boroughs as partners in a multi-municipal comprehensive plan will provide many benefits. It is likely the basic data collection will show that the existing housing stock in the overall area is much more diverse in type and cost than if only the townships would be studied. Options for new housing may also provide for more diverse types, costs and rentals. These “older communities” can be valuable partners in a multi-municipal plan.

Why “Older Communities” Should Partner with “Newer Communities” in Multi-municipal Planning

• The multi-municipal comprehensive plan can address matters related to revitalization, which will support the “older communities” needs.
• The multi-municipal comprehensive plan will have a much broader view, geographically and substantively, and help understand and address regional issues, particularly beneficial economic development.
• The multi-municipal cooperation provides all participants with greater political influence and may attract funding opportunities and private investment.

It will be most important that the multi-municipal comprehensive plan address important issues that “older communities” typically deal with in their planning. These include downtown and neighborhood
revitalization, sign regulations, residential conversions and in-town parking matters. Time and efforts devoted to the multi-municipal comprehensive plan cannot be limited to growth management issues for the less developed townships.

**Revitalization of “Older Pennsylvania Communities” – The Brookings Institution Report**

The term “Older Pennsylvania” was coined in the Brookings Institution Report *Back to Prosperity: A Competitive Agenda for Renewing Pennsylvania.* (2003) In the state’s classification of municipalities, these “older Pennsylvania communities” are the cities, boroughs and first-class townships. The first-class townships are the older suburbs or more established townships. These “older communities” are, in most cases, the centers of our historic settlement patterns. The population densities are more than ten times those of the townships of the second-class.

For a number of understandable reasons, people have left these “older communities” for new homes in the outer areas. Businesses and industry soon followed. The reasons include a less congested environment, lower taxes, less expensive land and homes, perception of better schools and proximity to open land and rural character. However, since so many people and businesses have made the move to the outer areas, the desired conditions have changed: more congestion, higher taxes, rapidly increasing land and housing prices, crowded schools and loss of open space and rural character.

*Back to Prosperity* makes that case that these trends have resulted in an inefficient and costly development pattern for both the “older communities” and the suburban townships. Based on the number of acres of urbanized land per new resident between 1982 and 1997, Pennsylvania was second in the nation for land consumption, sandwiched between Wyoming (No. 1) and South Dakota (No. 3). The “older communities” have had to raise taxes to support needed services due to their shrinking tax base. Second-class townships have raised taxes to address a rapidly increasing demand for services and facilities.

*Back to Prosperity* offers a number of recommendations that would help remedy these problems. Most applicable are the recommendations to encourage multi-municipal planning and to “forge compacts among communities of common interest.”

Many of the report’s recommendations focused on revitalization of “older communities,” which would require action at the state level, including legislative action. However, there are a number of actions local governments can undertake.
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These include:

- Develop an inventory of vacant, abandoned and “brownfield” properties.
- Provide training on new building codes that are sympathetic to redevelopment and are adapted for rehab work.
- Use the Main Street and Elm Street programs to help revitalize commercial and residential neighborhoods.
- Support manufacturing land uses in “older” areas.
- Make reinvestment in “older communities” the explicit priority for public facilities. Think infill, redevelopment, reuse and revitalization of previously developed land.

Essentially, those involved in the preparation of a multi-municipal comprehensive plan should look to undeveloped and underused land in participating “older communities” to accommodate the anticipated higher density residential and nonresidential development.

 INTO THE FUTURE

With these matters in mind, multi-municipal comprehensive plans will be more complete, better prepared and help in the defense of the implementing zoning ordinances. Planning to provide for multi-family or higher density housing must be based on a logical, well-documented and understandable process customized to the municipal partners and the planning area. Planning for the rural areas of the region must take landowners’ rights seriously and use flexible standards that address the physical characteristics or constraints of properties.

Obviously, the development of a multi-municipal comprehensive plan can be complex. The solid analyses of conditions and projections are key components. Assistance of a competent planner and good land use solicitor are essential. Multi-municipal planning makes community and land use decisions easier among cooperating local governments without giving up their essential responsibilities. Goals for growth, economic development and conservation will be better balanced and more easily achieved.

Maybe planners will not have so much to worry about. The future for Pennsylvania’s communities looks brighter.