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Comments or inquiries on the subject matter of this publication should be addressed to:

Governor's Center for Local Government Services
Department of Community and Economic Development
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, Pennsylvania 17120-0225

(717) 787-8158
1-888-223-6837
E-mail: ra-dcedclgs@pa.gov
dced.pa.gov

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I. Zoning

Preface

Zoning (Planning Series Publication No. 4) is one of a series of 10 planning publications produced by the Governor's Center for Local Government Services (Center) as a means to educate both professionals and non-professionals on the ways that planning and land use management are achieved within the commonwealth. The planning publications were first developed in the 1970's and in subsequent editions have been revised to incorporate differences in the overall planning viewpoint, offer up-to-date best practices, and reflect the latest changes in Pennsylvania planning law. Each publication addresses a specific planning or land use method enabled through the Pennsylvania Municipalities Planning Code (MPC), Act 247 of 1968, P.L. 805, *as reenacted and amended,* 53 P.S. § 10101, *et seq.,* and used by municipalities throughout the commonwealth.

The Center's 10 Planning Series Publications are as follows:

- No. 1 – Local Land Use Controls in Pennsylvania
- No. 2 – The Planning Commission
- No. 3 – The Comprehensive Plan
- **No. 4 – Zoning**
- No. 5 – Technical Information on Floodplain Management
- No. 6 – The Zoning Hearing Board
- No. 7 – Special Exceptions, Conditional Uses and Variances
- No. 8 – Subdivision and Land Development in Pennsylvania
- No. 9 – The Zoning Officer
- No. 10 – Reducing Land Use Barriers to Affordable Housing

Zoning is an effective regulatory tool to help a municipality steer the extent, character, and quality of development. However, in doing so zoning ordinances include many and varied regulations and sometimes complex administrative procedures, either of which are challenging to understand for municipal officials and citizens.

To that end, the *Zoning* publication is specifically designed and intended to provide basic information that:

- Explains the purpose and intent of zoning, including the zoning ordinance and its development and administration pursuant to the provisions of the MPC;
- Describes the steps for preparation of the zoning ordinance and its contents;
- Outlines the process for enacting and amending the zoning ordinance;
- Provides an overview of the responsibilities of the parties involved in the administration of the zoning ordinance and methods for addressing challenges to the zoning ordinance; and
- Describes alternative approaches to zoning to promote flexibility, increase permissible density, or encourage affordable housing.

II. Introduction

Zoning is the means by which a municipality regulates the use of land and structures and the extent and character of development. Zoning, along with a subdivision and land development ordinance, which regulates the creation of property lines and development of and improvements to those properties, are two principal means to help achieve planning objectives outlined in a comprehensive plan. Zoning is an ordinance – a local law enacted by the elected governing body of a municipality – designed to protect public health, safety, and welfare and to guide growth.

When zoning was first utilized, its primary purpose was to prevent a property owner from using his or her property in ways which were a nuisance or actually harmful to neighboring property owners. Over the years, the scope of zoning has expanded, and its technical provisions have been improved to better fit communities, are more easily comprehended by the general public, and deliver a more effective approach for achieving the development that will benefit the community. As such, municipal governments and the courts no longer look upon zoning as only a "negative" tool to keep certain land uses out of a neighborhood. They also recognize zoning's value as a "positive" tool for encouraging certain development and for creating a more livable community. Modern zoning ordinances encourage preservation of natural (i.e., wetlands, forests, aquifers, floodplains) and historic features, plus farmland and agriculture, and promote innovative techniques such as traditional neighborhood development (TND), form-based zoning, cluster development, transit oriented development (TOD), lot averaging, and flexible building setbacks. Now more than ever, urban, suburban, and rural communities alike have the ability to establish both land use controls and development incentives to create sustainable and livable communities for future generations.

Too often zoning is thought of as a mechanism to control suburban expansion into rural areas, but it is an equally effective tool to preserve an urban community's historic resources and reinforce its walkable and traditional neighborhood development patterns. Many of Pennsylvania's urban communities are experiencing an increase in their redevelopment opportunities through downtown revitalization, economic restructuring, brownfield redevelopment, and blight eradication. Zoning has an important role to ensure redevelopment fits and enhances the urban fabric and its orientation to pedestrians, walkability, and lively mixes of land uses that are fueling the urban resurgence.

As described in both *Local Land Use Controls in Pennsylvania (Planning Series Publication No. 1)* and *The Comprehensive Plan (Planning Series Publication No. 3)*, zoning is just one of many tools for a community to achieve its community planning objectives, but it serves as key regulatory mechanism to protect property owners' rights and create more livable and sustainable communities.

III. Statutory Overview of Authority

The power to zone and to adopt zoning ordinances is granted to local governments by the Pennsylvania Municipalities Planning Code (MPC), Act 247 of 1968, P.L. 805, *as reenacted and amended,* 53 P.S. § 10101, *et seq.* Specifically, Section 601 of the MPC authorizes municipal governing bodies to enact, amend, and repeal a zoning ordinance. Counties are also empowered to enact zoning, but as specified by Section 602, they are restricted to zoning municipalities or portions thereof that have no zoning in effect at the time a county zoning ordinance is enacted. Such county zoning is repealed at the time that a municipality subject to the county zoning enacts its own zoning ordinance.

The MPC establishes the basic rules which a municipality must follow to enact, amend, administer, and enforce a zoning ordinance, as well as the authorized purposes and regulatory content of the zoning ordinance. Municipalities also are required to follow the body of law established by the decisions of the courts when administering matters under the MPC.

In Pennsylvania, the Municipalities Planning Code is the uniform planning and land use enabling law for all municipalities and counties, including those under home rule, but not for the cities of Philadelphia (consolidated with Philadelphia County) and Pittsburgh.[1]

Section 604 of the MPC requires that a zoning ordinance be designed to achieve the following objectives:

1. Promote, protect, and facilitate any or all of the following: public health, safety, and general welfare; coordinated and practical community development and proper density of population; emergency management preparedness and operations; airports, and national defense facilities; the provisions of adequate light and air; access to incident solar energy; police protection; vehicle parking and loading space; transportation; sewerage; schools; recreational facilities; public grounds; the provision of a safe; reliable and adequate water supply for domestic, commercial, agricultural, or industrial use, and other public requirements; preservation of the natural, scenic, and historic values in the environment; and preservation of forests, wetlands, aquifers, and floodplains.

2. Prevent one or more of the following: overcrowding of land; blight; danger and congestion in travel and transportation; loss of health, life, or property from fire; flood, panic, or other dangers.

3. Preserve prime agriculture and farmland considering topography, soil type, and classification and present use.

4. Provide for the use of land within the municipality for residential housing of various dwelling types encompassing all basic forms of housing, including single-family and two-family dwellings, and a reasonable range of multi-family dwellings in various arrangements, manufactured homes and manufactured home parks, provided, however, that no zoning ordinance shall be deemed invalid for the failure to provide for any other specific dwelling type.

5. Accommodate reasonable overall community growth, including population and employment growth and opportunities for development of a variety of residential dwelling types and non-residential uses.

Section 606 of the MPC also requires that a zoning ordinance reflect the land use policies of the municipality set forth in a statement of community development objectives. This statement can be supplied by reference to the comprehensive plan, or it may be provided in a statement of legislative findings of the governing body which may be and often is included as a preamble in the zoning ordinance. The community development objectives are an important part of the zoning ordinance and a foundation for analysis of a legal challenge to the requirements of the zoning ordinance.

A fundamental requirement of the MPC, found in Section 605, is that, except for counties, no part of any municipality enacting a zoning ordinance may be left unzoned. Different districts may be created, and different rules may apply within these zoning districts, but the zoning ordinance must apply to all areas of the municipality. The zoning districts created must be delineated on a map. This zoning map is an integral part of the zoning ordinance.

Within a given zoning district, uses are classified as permitted by right, by special exception or by conditional use, or prohibited. The zoning officer administers the provisions of the zoning ordinance to uses permitted by right (which must meet the requirements for such use stated in the zoning ordinance) and prohibited uses. The zoning hearing board is vested with exclusive authority to grant a use by special exceptions; the governing body is vested with exclusive authority to grant approval for a conditional use.

Another fundamental requirement of the MPC is that requirements for each class of use or structure within any one zoning district must be uniform throughout that district. However, Section 605 of the MPC authorizes classifications within a single district for:

- Making transitions at zoning district boundaries;
- Regulating nonconforming uses and structures; and
- Regulating, restricting, or prohibiting uses and structures at, along, or near:
  - Major thoroughfares, their intersections and interchanges, transportation arteries, and rail or transit terminals;
  - Natural or artificial bodies of water, boat docks, and related facilities;
  - Places of relatively steep slope or grade or other areas of hazardous geological or topographical features;
  - Public buildings and public grounds;
  - Aircraft, helicopter, rocket, and spacecraft facilities;
  - Places having unique historical, architectural, or patriotic interest or value; and
  - Floodplain areas, agricultural areas, sanitary landfills, and other places having a special character or use affecting and affected by their surroundings.

These latter provisions of the MPC invite the option of establishing an overlay zone superimposed upon the established zoning district. If, for example, a floodplain lies within a zoning district, the MPC permits the municipality to enforce a different set of regulations within the flood-prone area of the zoning district than those that are enforced within the remaining portion of the zoning district. Therefore, the provisions pertaining to the floodplain supplement – or overlay – the zoning district provisions.

State Mandates and Preemptions Affecting Local Zoning

Although the MPC is fundamentally an enabling statute – providing authority for municipal land use regulation – the MPC contains use and standards provisions that are mandatory and also provisions that limit or even prohibit municipal regulation of certain uses.

A municipality may only exercise such powers and authorities as are granted to it by Pennsylvania's legislature. Statewide statutory limitation on regulation by a municipality is referred to as preemption.

The MPC authorizes and requires a municipal zoning ordinance to address and/or accommodate the following:

- Promote and preserve prime agricultural land, promote the establishment of agricultural security areas, and encourage the continuity, development, and viability of agricultural operations. "Zoning ordinances may not restrict agricultural operations or changes to the expansion of agricultural operations in areas where agriculture has traditionally been present, unless the agricultural operation will have a direct adverse effect on public health and safety." *Sections 603(c)(7), (g)(1) and (h) of the MPC.*

The Agriculture, Communities and Rural Environment Act (ACRE), Act 38 of 2005, 3 Pa.C.S. §§ 311-318, restricts local regulation of "normal agricultural operations" as defined in Section 2 of the Act of June 10, 1982 "An Act Protecting Agricultural Operations from Nuisance Suits and Ordinances Under Certain Circumstances." ACRE authorizes the commonwealth's Attorney General to make a determination that a local ordinance, including a zoning ordinance, may be an "unauthorized local ordinance" if in violation of the proscriptions set forth in ACRE and to bring an action against the municipality to invalidate the unauthorized local ordinance.

- Ensure forestry activities, including timber harvesting, as a permitted use by right in all zoning districts in every municipality to encourage the maintenance and management of forested or wooded open space and promote the conduct of forestry as a sound and economically viable use of forested land. *Section 603(f) of the MPC.*
- Provide for the reasonable development of minerals. *Section 603(i) of the MPC.*
- Promote and preserve environmentally sensitive areas and areas of historic significance and protect natural and historic features. *Sections 603(c)(7) and (g)(2) of the MPC.*

Municipalities also must exercise their duties as trustees pursuant to the Environmental Rights Amendment of the Pennsylvania Constitution, Pa. Cost. Art. 1 § 27., which provides: The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the commonwealth shall conserve and maintain them for the benefit of all people.

- Provide for no-impact home-based businesses in all residential zones as a use permitted by right, except as restricted by deed restriction or covenant in common interest ownership communities. The requirements and standards are found in the definition of "no-impact home-based business." *Section 107(a) of the MPC.*
- Exempt from zoning regulation any building used or to be used by a public utility corporation upon decision by the Pennsylvania Public Utility Commission that such building is "reasonably necessary for the convenience or welfare of the public." *Section 619 of the MPC.*

The courts have interpreted Section 619 to not only exempt from zoning regulation the building, but also structures and facilities.

In addition to the MPC, provisions affecting local zoning authority may be found in other Pennsylvania statutes. Municipalities should consult with their solicitor on such other law as may have been enacted by the Pennsylvania legislature.

The Airport Zoning Act (AZA), 74 Pa. C.S. § 5911 et seq., requires municipalities having an airport hazard area within its municipal limits to adopt, administer, and enforce zoning regulations for the airport hazard area in accordance with the provisions of the AZA. The Pennsylvania Supreme Court in *Chanceford Aviation Properties, LLP and Chanceford Aviation, Inc. v. Chanceford Township Board of Supervisors,* 923 A.2d 1099 (Pa. 2007), affirmed that the municipality's duty to enact such zoning regulation is mandatory. Where a municipality does not have a zoning ordinance, the Airport Zoning Act only requires the municipality to adopt zoning regulations for the airport hazard area; such municipality is not required to adopt a municipality-wide zoning ordinance.

Recent amendments to the Pennsylvania Oil and Gas Act, Act No. 13 of Feb. 14, 2012, P.L. 87, 58 Pa.C.S. §§ 2301-3504 (Act 13), contained mandates for local zoning relating to gas operations. The Pennsylvania Supreme Court held that these provisions (specifically Sections 3303 and 3304) were unconstitutional because in violation of the Environmental Rights Act of the Pennsylvania Constitution. *Robinson Township, et al. v. Commonwealth of Pennsylvania Public Utility Commission,* et al., 2013 Pa. LEXIS 3068 (Pa. 2013).

The MPC expressly provides for the preemption of local zoning regulation by certain state laws enumerated in Section 603(b). Preemption generally takes one of three forms: (i) express or explicit preemption where the language of the law specifically bars local authorities from acting on a particular subject matter; (ii) conflict preemption where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the state statute; and (iii) field preemption, where analysis of the entire statute reveals the legislature's implicit intent to occupy the field completely and to permit no local enactments. The MPC identifies the state laws and the subjects regulated by those laws, to include surface mining, coal extraction, oil and gas operation, nutrient management plans for concentrated animal operations, agricultural security areas, and protection of agricultural uses from nuisance suits.

There are other established instances of state law preempting local zoning regulation of use operations, while preserving the right of a municipality to regulate where a use is permitted to locate within a municipality in conformance with the overall planning for a community. As example, the Surface Mining Conservation and Reclamation Act, Act of December 19, 1987, preempts a municipality's regulation of certain operational aspects of a surface mine, but does not preempt a municipal ordinance from restricting such mines to certain zoning districts.

Pennsylvania courts have repeatedly held that the Liquor Control Law preempts the entire field of liquor regulation and prohibits zoning regulation relating to the dispensing of liquor such as by or within a restaurant or bowling alley. While a zoning ordinance may regulate where a restaurant or bowling alley may operate within the municipality, it may not regulate the restaurant's or bowling alley's dispensing of liquor pursuant to state-issued liquor licenses.

The Gaming Act, Act 71 of 2004, when first enacted included a "local land use preemption" section, Section 1506. However, the Pennsylvania Supreme Court held that Section 1506 violated the requirements of Article II Section 1 of the Pennsylvania Constitution because it did not provide the Gaming Control Board with constitutionally adequate standards, policies, and limitations to administer that section. *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth of Pennsylvania,* 877 A.2d 383 (Pa. 2005). In response, the Pennsylvania Legislature amended The Gaming Act to vest the Pennsylvania Supreme Court with exclusive appellate jurisdiction to consider appeals from municipal decisions involving "zoning, usage, layout, construction or occupancy, including location, size, bulk and use of a licensed facility." *4 Pa.C.S. § 1506.*

Federal law also restricts or directs the zoning regulation of certain uses. The federal Telecommunications Act of 1996, 47 U.S.C. § 332(c), prohibits local zoning regulation of the placement, construction, or modification of wireless facilities where such regulation "unreasonably discriminates among providers of functionally equivalent services" or "prohibits or [has] the effect of prohibiting the provision of personal wireless services." The federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C.A. §§ 2000cc et seq., and its Pennsylvania counterpart the Pennsylvania Religious Freedom Protection Act (RFPA), Act No. 214, December 9, 2002, 71 P.S. §§ 2401 et seq., restrict land use regulations that impose a substantial burden on the religious exercise of a person. The Federal Fair Housing Act and its Pennsylvania counterpart the Pennsylvania Human Relations Act, Act of October 27, 1955, as amended, 43 P.S. §§ 951 – 963, prohibit discrimination against individuals with physical or mental disabilities, mandating that group homes for such disabled persons be treated in similar fashion to single family residences.

Exclusionary Zoning and the Fair Share Doctrine

According to Pennsylvania court doctrine dating back to the 1960s, a municipal zoning ordinance must provide for – and may not exclude from the municipality – all lawful uses of land. Failure to provide for a lawful use is exclusionary and grounds for a legal challenge for which relief is to permit the use as and where proposed. However, it is near impossible for a zoning ordinance to provide for all possible legitimate uses, including emerging uses (a recent example is the cellular telecommunications tower). Municipalities can protect against exclusionary challenges by including a "savings clause" in the zoning ordinance. In general terms, a savings clause provides for any use not otherwise provided for in the zoning ordinance. An example of a savings clause is a provision that any use not expressly provided for in the zoning ordinance shall be permitted as a use by special exception [or conditional use], or a provision that any use not expressly provided for in the zoning ordinance as a permitted use the zoning officer shall apply the standards and requirements of the use permitted by the zoning ordinance that is most comparable in scale, character, and impact.

When an exclusionary challenge is lodged against a municipality, the municipality bears the burden of proof and must justify the exclusion of a proposed lawful use. A municipality cannot successfully defend against an exclusionary challenge by reliance upon having nominally provided for the use, as such practice will be challenged as illusory zoning. However, if the exclusionary challenge asserts that the land zoned for a particular use has been fully developed, a municipality may defend against an exclusionary claim on the basis that it has adequately provided for such use in light of demonstrable current demand in the community.

A total exclusion of any of the basic forms of housing is unlawful. MPC Section 604(4) says a purpose of zoning shall be to provide for "residential housing of various dwelling types encompassing all basic forms of housing, including single-family and two-family dwellings, and a reasonable range of multifamily dwellings in various arrangements, mobile homes, and mobile home parks". In *Surrick v. Zoning Hearing Board of Upper Providence Township* the Pennsylvania Supreme Court established the fair share doctrine. It includes a multi-part test to determine if a municipal zoning ordinance appropriately and adequately accommodates a fair share of regional housing growth. Pennsylvania's judicially-created fair share doctrine rests on constitutionally protected property rights.

Reference

1. Article XV, Section 1 of the Pennsylvania Constitution of 1874, the First Class City Home Rule Act, Act of April 21, 1949, as amended by the Act of June 1, 1995, 53 P.S. §§ 13101 et seq., and the home rule charter adopted under those enabling authorities are the source of authority for Philadelphia's municipal planning and land use regulation. The Second Class City Zoning Law, Act of March 31, 1927, 53 §§ 25051 et seq., the Home Rule Charter and Optional Plans Law, and the home rule charter adopted under those enabling authorities is the source of authority for Pittsburgh's municipal planning and land use regulation.

IV. Zoning Ordinances

The Relationship Between Planning and Zoning

In basic terms, a zoning ordinance divides all land within a municipality into districts and creates regulations that apply generally to the municipality as a whole as well as specifically with individual zoning districts. To properly delineate the boundaries of zoning districts and to determine the appropriate types and mix of uses for specific zoning districts, a municipality should conduct studies of land use and development trends, demographics, economics, environmental conditions, and other factors affecting future land use. Based upon these studies, rational decisions can be made concerning the zoning districts.

The comprehensive plan is a document that contains the studies and the recommendations referred to above and that sets forth the land use policies of the municipality. It is upon these studies and recommendations and policies that the zoning ordinance is based. As required by Section 603(j) of the MPC, a zoning ordinance adopted by a municipality "shall be generally consistent with the municipal or multimunicipal comprehensive plan, or where none exists with the municipality statement of community development objectives and the county comprehensive plan." Hence, zoning is ultimately based upon planning. *See Planning Series No. 3: The Comprehensive Plan.*

The terms "planning" and "zoning" are often used interchangeably, but there is a definite distinction made between the two. Planning itself is not law or regulations. A plan is a guide or a blueprint. It may be adopted by a municipality, but it is advisory or, in the term used by Pennsylvania courts, "recommendatory." Zoning is regulatory. It is law in the form of an ordinance enacted by a municipality's elected governing body. Despite the distinction, planning and zoning relate directly to each other. Planning is the principal means to prepare for enactment of zoning, for a municipality to set forth community development goals and objectives, based on a comprehensive analysis, that serve as the foundation and legal basis for a zoning ordinance. Zoning is one method – though an effective one – of implementing a plan.

One unique means of integrating the planning and zoning process is afforded through the specific plan provision of Section 1106 of the MPC. A specific plan serves as a hybrid between a master plan, zoning ordinance, and subdivision and land development ordinance whereby participating municipalities of a county or multimunicipal comprehensive plan may adopt the specific plan by ordinance to address the specific development criteria for any nonresidential part of the area covered by the specific plan. The specific plan must include text and a diagram or diagrams and be adopted by ordinance to specify in detail all of the following technical provisions:

1. The distribution, location, extent of area, and standards for land uses and facilities, including design of sewage, water, drainage, and other essential facilities needed to support the land uses;
2. The location, classification, and design of all transportation facilities, including, but not limited to, streets and roads needed to serve the land uses described in the specific plan;
3. Standards for population density, land coverage, building intensity, and supporting services, including utilities;
4. Standards for the preservation, conservation, development, and use of natural resources, including the protection of significant open spaces, resource lands, and agricultural lands within or adjacent to the area covered by the specific plan; and
5. A program of implementation including regulations, financing of the capital improvements, and provisions for repealing or amending the specific plan.

Although there are no known instances in which a specific plan has been adopted by a governing body for the purposes of implementing a county or multimunicipal comprehensive plan, specific plans provide a useful tool for such municipalities. Their utility should be further considered during the comprehensive planning process.

Another connection between planning and zoning is the provision under Section 608.1 of the MPC that requires a municipal authority, water company, or any other municipality to notify a municipality of its plans to expand water, sanitary sewer, or storm sewer service to a proposed development that has not received any municipal approvals within the municipality. In such instances, the affected municipality is afforded the opportunity to confirm if the proposed service extension is generally consistent with its zoning ordinance and whether such service may conflict or negatively impact the municipality's land use planning.

Multimunicipal Zoning Options

As authorized by Section VIII-A of the MPC, two or more municipalities that have adopted a joint municipal comprehensive plan may also cooperate to enact, amend, or repeal a joint municipal zoning ordinance. A *joint municipal zoning ordinance* shall be based upon an adopted joint municipal comprehensive plan and shall be prepared by a joint municipal planning commission established under the MPC.[1]

There is particular benefit to municipalities participating in a joint zoning ordinance regarding exclusionary zoning challenges. As noted earlier, courts have set a standard that a municipal zoning ordinance may not exclude a lawful use from the municipality. All lawful uses must be provided for in some zoning district in each zoned municipality. Where municipalities are participating in a joint municipal zoning ordinance, the MPC directs that this standard may be met if a use is reasonably provided for somewhere within the total area of all participating municipalities.

Joint municipal zoning ordinances follow the provisions for municipal zoning specified under Article VI of the MPC and specified under Section VIII-A as follows:

- **Classifications –** No area of a municipality that has enacted a joint zoning ordinance may be unzoned.
- **Community development objectives –** A joint zoning ordinance must contain a statement of community development objectives, be based on the joint comprehensive plan, and shall:
  - Relate to the entire area covered by the ordinance;
  - Identify objectives of each municipality and how they relate to the entire area; and
  - Include the basis for the geographic delineation of the area which the ordinance regulates.
- **Preparation –** A joint municipal planning commission shall prepare the ordinance directed by the governing bodies and shall hold the required public meeting.
- **Enactment –** Each municipality must enact the ordinance, and no municipality may withdraw or repeal within two to three years of enactment.
- **Amendments –** An amendment must also be submitted to the joint municipal planning commission for 30-day review, governing bodies must submit recommendations, and the amendment must be adopted by each municipality.
- **Administration –** The governing bodies may create a joint zoning hearing board or individual boards in each municipality, and the ordinance must specify if there will be a zoning officer in each municipality or a single zoning officer that administers the joint zoning ordinance.
- **Enforcement –** Enforcement remedies may be taken by one municipality against another.

As another option, MPC Article XI authorizes municipalities participating cooperatively in a multimunicipal or county comprehensive plan to enact *separate but consistent zoning ordinances* having a legal effect similar to a joint municipal zoning ordinance. The MPC defines multimunicipal plan as one adopted by any number of contiguous municipalities, except that all the municipalities need not be contiguous if all are within the same school district. Article XI allows municipalities participating in a cooperative plan to have separate, individual zoning ordinances which are made

generally consistent with the plan. Where this is done, the MPC directs that the exclusionary zoning standard may be met if all lawful uses are reasonably provided for somewhere within the total area of all participating municipalities without each municipality having to zone for all uses. Two other prerequisites are: 1) the cooperative multimunicipal or county plan shall include a plan for how and where all categories of uses will be accommodated within a reasonable geographic area of the plan; and 2) the participating municipalities shall enter into a cooperative implementation agreement which establishes a process for achieving general consistency of the individual zoning ordinances and the plan within two years of adoption.

The topic of multimunicipal planning and zoning, including their relationship to exclusionary zoning and fair share doctrines, is thoroughly discussed in *Planning Beyond Boundaries* published by 10,000 Friends of Pennsylvania – http://10000friends.org/planning-beyond-boundaries.

Preparation of the Zoning Ordinance

The zoning ordinance serves a dual purpose: to coordinate and guide development and to provide certain standards for development. It is the tool by which the municipality's comprehensive plan can be related to the needs of the community by providing a means for orderly development.

The preparation of a zoning ordinance should be preceded by the development of a comprehensive plan. As noted earlier, a comprehensive plan studies land use and development trends, demographics, economics, environmental conditions, and other factors affecting future land use. And, a comprehensive plan sets forth community development goals and objectives and articulates public interests that serve as the foundation and legal basis for a zoning ordinance.

(It is not mandatory in Pennsylvania that a zoning ordinance follow and be based on a comprehensive plan. Alternately, a zoning ordinance may be based on a statement of community development objectives provided in a statement of legislative findings of the governing body. However, this is a lesser option since it would not provide the depth and breadth of intelligence for the zoning ordinance as would be in a comprehensive plan.)

The regulations in a zoning ordinance should be designed to address the unique goals and objectives, needs, and public interests in each individual municipality. There is no such thing as a standard or "model" zoning ordinance. Neither is it appropriate for a community to adopt the zoning ordinance of another municipality by changing the name of the municipality and inserting its own zoning map. Zoning should not be rules for rules' sake. Rather, zoning regulations should have a definite tie to helping a municipality accomplish desired goals whether business development, neighborhood improvement, capitalizing on local history, encouraging walkability, etc.

MPC section 607(a) prescribes that a zoning ordinance "shall be prepared by the planning agency of each municipality upon request by the governing body." It is advisable that the planning agency involve a professional planner in preparing the ordinance. Planners are trained in zoning and have knowledge of best practice regulations that can be employed to address various community objectives and needs. Some municipal planning agencies have one or more professional planners on staff that can be involved in preparing the ordinance. Where there is no staff, only a citizen planning commission, the municipality may seek professional help from the county planning agency or a private planning consultant. In addition, the planning agency may involve other citizens or local interest groups in the process. When the zoning ordinance is complete, the planning agency presents it to the local elected officials for consideration and enactment.

Contents of the Zoning Ordinance: An Overview

The text of the zoning ordinance contains numerous regulations. Some of these apply equally to every area within the municipality. Others vary from zoning district to zoning district. MPC section 603 prescribes what types of provisions may be in zoning ordinances. The following is a basic explanation of these regulations.

Use Regulations – Control over the use of land is the foremost type of regulation contained within the zoning ordinance. All land within the municipality is divided into various zoning districts, with different types of land uses permitted within each zoning district. For example, specific zoning districts may be created for residential, agricultural, commercial, and industrial uses. This approach of segregated uses, known as Euclidean zoning, is traditional to zoning and seeks to assure compatibility between land uses. Other zoning approaches create zoning districts such as town center, village, conservation, and transitional which encourage mixing of uses and assure compatibility by performance or form standards.

Dimensional Regulations – Regulations establishing lot and building sizes and density and intensity of use are common to zoning. Different lot sizes may be established for each zone or for various types of land uses. For example, a single-family residential district may have a minimum lot size requirement of 10,000 square feet, while in a conservation district the minimum lot size requirement may be one acre or larger. There may be requirements for lot width and depth, and for front, side, and rear yards, which may vary from one district to another. These regulations may be in the form of minimums designed to provide sufficient light and ventilation to ensure privacy and to protect public safety by maintaining space between buildings and between streets, or they may be maximums designed to maintain the historical integrity or traditional neighborhood character of an area. Building floor areas and heights, as well as the amount of lot area buildings occupy, can also be controlled.

Additional regulations – Zoning ordinances usually contain additional regulations addressing use of land and buildings for parking and signs. These types of regulations are used to promote public safety and enhance community character objectives. Off-street parking requirements generally specify a certain number of spaces for each type of land use. For example, apartment buildings may need two parking spaces per dwelling unit, while an apartment for the elderly may only need one space per unit. Places that generate a high volume of traffic require more parking spaces. For offices, one space may be required for each occupant, plus additional spaces for visitors. It is not uncommon for retail stores to have parking standards based upon floor area; one space for every two hundred square feet of gross leaseable area, for example. In terms of signs, zoning regulations typically regulate a variety of characteristics that affect safety and mobility of motorists and pedestrians. These include number, size, location, and placement of signs, plus lighting, flashing, moving parts, continuous changing content, and structural integrity of signs.

MPC section 605(2)(vii) provides authority for floodplain regulations to be included in zoning ordinances. In Pennsylvania, the Flood Plain Management Act (Act 166 of 1978) requires all flood-prone municipalities to enact regulations controlling development in identified floodplain areas. Regulations must meet minimum specifications of the National Flood Insurance Program and typically require elevation and flood-proofing of structures.

Nonconforming Uses and Structures – When any zoning ordinance is enacted, lawfully existing structures, lots, and uses of land may not comply with new zoning regulations. These are known as nonconforming uses, lots, or structures. The right of such nonconforming conditions to continue is constitutionally protected. Such nonconformities may continue until abandoned. As established by the Pennsylvania courts, abandonment requires both actual abandonment and the intent to abandon the nonconformity. Additionally, the right of a commercial or industrial nonconforming use to expand upon the lot occupied by the business at the time of the enactment of the ordinance that made the use nonconforming in order to maintain economic viability or to take advantage of increases in trade also is constitutionally protected. This principle is known as the doctrine of natural expansion. Municipalities may regulate expansion, change, restoration, and abandonment of such uses by provision in the zoning ordinance of reasonable restrictions, so long as the constitutionally protected rights to continue and expand are respected.

Administrative Regulations – Zoning ordinances also contain regulations necessary to administer the ordinance which typically provide for:

- A zoning permit system by which proposed development and uses of land and buildings are submitted to the municipality for review and approval if conforming to the zoning ordinance;
- Procedures for enforcing zoning violations;
- A zoning officer to be appointed to administer the ordinance and review and issue zoning permits *(See Planning Series No. 9: The Zoning Officer)*; and
- A zoning hearing board to be appointed to hear and decide requests for variances, special exception uses, and appeals of zoning officer determinations and validity of the zoning ordinance *(See Planning Series No. 6: The Zoning Hearing Board)*;
- Reasonable fees for administering the zoning ordinance.

Adopting and Amending the Zoning Ordinance

The MPC sets forth required procedures for the consideration and adoption of a zoning ordinance or an amendment to an existing zoning ordinance. Conformance with the MPC procedures is mandatory as they protect the due process rights of the regulated public.

The same procedural requirements described in this section are applicable to the enactment of a joint municipal zoning ordinance. However, each municipality party to a joint municipal zoning ordinance must enact the ordinance, and it is not deemed effective until it has been properly enacted by all the participating municipalities.

Section 607(b) of the MPC provides that the municipal planning agency is required to hold at least one public meeting pursuant to public notice at which all citizens are given the opportunity to express their views concerning the proposed zoning ordinance as a whole or its application to individual properties. The planning agency may hold as many public meetings as it feels are necessary to provide the public with a full explanation and an opportunity to comment. With respect to an amendment to the zoning ordinance, this procedure is optional.

A public meeting is not a "public hearing" (compare definitions of "public meeting" and "public hearing" in Section 107(a) of the MPC).

Following the meetings, the planning agency should make such changes or revisions as it deems advisable and submit the proposed zoning ordinance and any recommendations to the governing body. The governing body determines when the proposed zoning ordinance is ready for consideration, then sets the date for a public hearing on the proposed zoning ordinance.

Pennsylvania's judicially-created pending ordinance doctrine provides that, in cases involving an application for a building permit, when the municipality has made a "sufficient public declaration of an intent to amend the existing zoning ordinance, it is the pending amendment which governs the issuance of such permits." The pending ordinance doctrine applies only to zoning ordinances.

The MPC requires that the county planning agency be given an opportunity to review and submit recommendations on the proposed ordinance prior to the public hearing. The MPC sets different review periods for a new zoning ordinance and an amendment to an existing zoning ordinance. The review period for a new zoning ordinance is 45 days; the review period for an amendment to a zoning ordinance is 30 days. For a proposed amendment to a zoning ordinance not prepared by the municipal planning agency, the MPC requires that the municipal planning agency be given a 30-day opportunity prior to the public hearing to review and submit recommendations. The new ordinance or amendment review period is an opportunity for a planning agency to provide its recommendations to the governing body; however, should a planning agency fail to submit recommendations within the required review period, the governing body is under no obligation to extend the time for review and recommendation and proceed with the public hearing.

The MPC requires that the governing body must hold at least one public hearing (or more if necessary) at which all interested parties are given the opportunity to be heard on the proposed zoning ordinance or amendment. This public hearing must be advertised according to the MPC public notice requirements. Public notice of the public hearing must be published in a newspaper of general circulation in the municipality in two successive weeks. The first notice may not be published more than 30 days prior to the public hearing, and the second notice may not be published fewer than seven days prior to the public hearing.

The Statutory Construction Act of 1972, 1 Pa.C.S. § 1501, et seq. provides that the phrase "successive weeks" means calendar weeks. However, it further provides that "at least five days shall elapse between each publication."

A 2013 amendment to the MPC requires that a municipality provide mailed notice or electronic notice of the public hearing on a proposed new zoning ordinance or amendment to an owner of land or underlying mineral rights in the municipality who has made timely request for such notice. Mailed notice is to be provided by first-class mail using self-addressed, stamped envelopes which must be supplied to the municipality by the requester. Electronic notice is to be provided by the Internet using an electronic address supplied to the municipality by the requester. Mailed notice shall be deposited in the U.S. Mail or electronic notice sent not more than 30 days and not less than seven days prior to the public hearing date. The municipal secretary or zoning officer must keep a record of mailed and electronic notices and dates sent.

If the proposed amendment involves a zoning map change, the notice of the public hearing must also be "conspicuously posted by the municipality at points deemed sufficient by the municipality along the tract to notify potentially interested citizens." Such posting shall be made at least one week prior to the date of the public hearing. Also, notice of the public hearing must be mailed by the municipality at least 30 days prior to the public hearing by first-class mail to the addresses to which real estate tax bills are sent for all properties located within the area proposed for rezoning.

Section 610 of the MPC imposes a separate notice requirement relating to the enactment of (voting upon) an MPC ordinance or amendment thereto. Unlike the notice of the public hearing on a proposed ordinance or amendment, the notice of an intent to enact is published one time only, no less than seven days prior to the meeting at which passage of the ordinance will be considered (and no more than 60 days prior). Notice must include the full text of the ordinance or amendment or a summary prepared by the municipal solicitor. If the full text is not set forth in the notice, then a copy must be supplied to the newspaper at the time the notice is published and an attested copy filed in the county law library. In order to save costs, the notice of intent to enact may be included with one of the two public notices for the public hearing, provided its publication meets the time requirements for both the enactment and public hearing notices.

The public notice requirements serve several purposes. The first is to clearly state the intent of the planning agency or governing body to prepare and enact a particular proposed zoning ordinance or amendment. The second is to make the local citizenry aware of the planning efforts within the municipality and to afford them an opportunity to participate in the planning effort.

If after the public hearing, a proposed amendment is "changed substantially, or is revised to include land previously not affected by it," before proceeding to vote on the changed amendment the governing body is required to hold another public hearing, subject to public notice. Also, the MPC separately provides that a notice of a substantially-amended zoning ordinance or amendment be published no later than 10 days prior to the governing body's vote (at a meeting compliant with the procedural requirements in the Sunshine Act). Such notice must include a brief summary of all the provisions along with a summary of the changes.

The courts have provided guidance on making a determination whether a revision is "substantial." The courts have advised that the determination must be made by considering the revision "in relation to the legislation as a whole." The courts have then advised that a revision is "substantial "in relation to the legislation as a whole" when it results in either (i) a significant disruption in the continuity of the proposed legislation or (ii) an appreciable change in the overall policy within the municipality. Additionally, the courts have commented that another factor in determining the substantiality of a revision is whether it affects other landowners in a different way or has an adverse impact on adjoiners.

In applying these guidelines, the courts have advised that a revision is not substantial where the revision does not add or delete a permitted use or does not change a district boundary or classification. There appears to be consistency in the decisions of the courts that a revision that "merely makes regulations more stringent than initially proposed" is not substantial.

Whether the revisions to a proposed zoning amendment are "substantial" or "insignificant", the courts have held that the proposed amendment in its revised form must be submitted to the municipal and county planning agencies for a 30-day period for review and recommendation.

The MPC allows a governing body 90 days after the last public hearing to vote on the enactment of a proposed ordinance.

Following enactment, a copy of the enacted zoning ordinance or amendment must be placed in the municipal ordinance book as required by the ordinance provisions set forth in the respective state municipal codes. Within 30 days following enactment, a copy of the enacted zoning ordinance or amendment must be provided to the county planning agency. While not stated as such in the MPC, the courts have commented that the latter requirement is directory and not mandatory.

The mandatory procedures discussed above are extremely important. As explained by the courts, these procedural rules provide notice and the opportunity to be heard and have the purpose of protecting the interest of the public in the legislative process. The validity of the zoning ordinance rests on compliance with these procedures. If these procedures are not followed, the zoning ordinance could be declared null and void by a court of law in a procedural challenge to the zoning ordinance.

Zoning ordinances typically provide that a zoning text or map amendment may be requested by a private party – for instance, an owner of land or his/her duly authorized representative – in addition to a proposal from the planning agency or governing body. While the MPC prescribes in the previously described procedures HOW a municipality must consider a zoning amendment, the MPC is silent as to IF a municipality must consider an amendment. The most common and defensible policy is for a municipality to fully consider and render approval or disapproval decisions on zoning amendment requests. However, the amendment process involves significant expense, including staff and solicitor time, public notices, and a public hearing. Because a zoning amendment is a legislative action, in its discretion the municipality may take official action to consider a requested amendment or defer such action indefinitely. An amendment that is frivolous or repetitive arguably may support the discretionary decision of the municipality to not take any official action on such proposal.

A zoning ordinance should be periodically amended. Amendments may change substantive (permitted uses, lot size requirements, etc.) or procedural requirements in the zoning text, or change the zoning map. A comprehensive review and revision of the zoning ordinance would be appropriate following an update to the municipal comprehensive plan or after passage of a period of years in which the ordinance becomes outdated in terms of conditions in the municipality and best zoning practices. In the interim, partial and singular zoning amendments are a reasonable response to changes in demographic, economic, and development trends, adjustments in community goals and objectives, emergence of new land uses, or changes to the MPC or case law.

A comprehensive review and revision of the zoning ordinance including numerous and widespread changes is effectively a rescission of the existing ordinance and enactment of a new ordinance. In preparing and considering a comprehensive zoning ordinance revision, a municipality should follow MPC procedures for enactment of a new zoning ordinance.

Zoning Districts

The fundamental aspect of a zoning ordinance is the establishment of zoning districts or "zones." The ordinance establishes, in text and on a map, different zoning districts at different locations in the municipality. Each zone contains a unique set of land use rules that specify 1) permitted uses of land and buildings; 2) density and intensity of land use as expressed by lot, setback, yard, area, and height requirements; and 3) other requirements to promote public health, safety, and welfare, and achieve MPC-authorized zoning purposes.

The design and mapping of zoning districts is typically based on two things: 1) the goals and community development objectives of the municipality, including what types of land uses and character of development are desired at which locations in the municipality and 2) "reality" factors that influence suitability of certain land uses, including environmental conditions (soils, slope, wetness), economic factors, and availability of public infrastructure (roads, utilities, parks) and services (police, fire). A comprehensive plan is the primary means for a municipality to study local conditions and set objectives for the design of zoning districts.

Section 605 of the MPC provides the authority for creation of zoning districts. It says various zoning districts can be created by applying different provisions to different classes of situations, uses, and structures. It also says provisions shall be uniform for each class of uses or structures within each zoning district. Section 605 also provides flexibility for additional zoning classifications where needed to address transitions between zoning districts, regulating non-conforming uses and structures, and regulating uses near major transportation facilities, natural features, public buildings and grounds, places with historical/architectural value, and other places having special character or use. Lastly, Section 605 requires that all parts of a municipality (except in the case of a county zoning ordinance) must be included in some zoning district.

The traditional approach has been to create separate zoning districts for residential, commercial, industrial, and other classes of uses. Single-use zones are often further classified by density or intensity, such as R-1 single-family residential, R-2 multi-family residential, C-1 downtown commercial, C-2 highway commercial, etc. This approach of segregated land uses is known as Euclidean zoning, named after the landmark case *Village of Euclid v. Ambler Realty Co.* (U.S. Supreme Court, 1926), in which the zoning ordinance upheld by the Supreme Court was designed in large part to limit encroachment of industrial uses into residential areas.

Mixed-use districts are becoming more common in zoning. Changes in the economy, lifestyle preferences, and community values are creating market demands for mixed-use development that traditional Euclidean zoning cannot accommodate. Communities are seeking the social and cultural vibrancy of mixed-use development. Also, mixed-use development is arranged more conveniently for walking (growing in demand) and for less auto dependency and its related traffic and parking problems. Zoning ordinances are more commonly creating districts such as traditional neighborhood, town center, and village which promote mixed-uses.

Another approach – form-based zoning – is becoming better known and more used in Pennsylvania. Form-based zoning uses physical form and scale (i.e., character) of development rather than land use as the organizing principle for zoning districts. The intent is to achieve harmonious development not by separating uses but by addressing the relationship between building facades and the public realm, the form and mass of buildings in relation to one another, and the scale and types of streets and blocks. There is more discussion about form-based zoning in the "Alternative Approaches to Zoning" section later in this report.

Uses by Right

A zoning ordinance will identify for each zoning district a list of uses permitted by right. These are uses for which an applicant demonstrating compliance with specific requirements for such uses set forth in the zoning ordinance has a right to approval and issuance of a permit. The zoning officer administers these use provisions of the zoning ordinance.

Uses not expressly identified as permitted by right or permitted by special exception or conditional use are not permitted in the zoning district. Some zoning ordinances also list prohibited uses, but this is done only for emphasis. In such instance, if a use is not listed as prohibited, and it is not listed as permitted (by right, special exception, or conditional use), the use is not permitted in the district.

Special Exceptions and Conditional Uses

In addition to uses by right, zoning ordinances may designate uses permitted as special exceptions or conditional uses within a given zoning district. In enacting the ordinance including uses permitted by special exception or conditional use, the governing body makes the determination that these uses are not contrary to public health, safety, and welfare. Rather, they are permissible and legitimate uses within the zoning district. Their designation as special exceptions or conditional uses subjects them to additional criteria and safeguards and a closer examination by a body beyond the zoning officer in granting their approval. For example, a zoning district may provide for single-family houses by right, but may provide for townhouses by special exception or conditional use. Both uses are permitted within the zoning district. However, the individual wishing to construct townhouses is subject to additional application and review procedures and must meet additional safeguards and criteria to proceed with his or her plans.

Special exceptions and conditional uses are usually reserved for those land uses that will have a significant impact on the zoning district or the whole community, or for those uses that necessitate additional safeguards. These additional safeguards take the form of specific standards for special exceptions and conditional uses. Such standards must be stated in the zoning ordinance. The applicant for a special exception or conditional use is required to demonstrate conformance with the specific standards stated in the zoning ordinance; having done so, the applicant is entitled to approval of his or her special exception or conditional use. In general terms, a specific standard is one that allows compliance to be objectively measured. Often a zoning ordinance contains subjective standards as well as specific standards. However, those objecting to the application – not the applicant – bear the burden of proving that the proposed development does not conform to the subjective standards. And the objector must prove noncompliance with a subjective standard with credible and particularized evidence and further prove that the proposed use will create harm greater than normal for a use of that type.

The prime difference between a special exception and a conditional use is the entity making the decision on the application for approval of the proposed use. Special exceptions are presented to the zoning hearing board for approval. Conditional uses are presented to the governing body of a municipality. The decision to provide for a use as a special exception or a conditional use in the zoning ordinance is in the sole discretion of the governing body. That decision rests on such factors as whether the governing body seeks to retain an active role in the review and administration of the zoning ordinance for such uses and the impact of the use on the community. *See Planning Series No. 7: Special Exceptions, Conditional Uses and Variances.*

Variances

A variance is a means to obtain relief from the strict administration of the requirements of the zoning ordinance. It enables a property owner to use his or her land which, due to specific location, topography, size, or shape, would otherwise not be suitable for development under the strict application of the requirements of the zoning ordinance. It is a permission granted as relief from the unnecessary hardship that would be imposed by strict administration of ordinance provisions.

Only the zoning hearing board has authority to hear and decide upon an application for variance from a requirement of the zoning ordinance. The zoning officer has no power to grant variances. The governing body has no power to grant variances.

Section 910.2(a) of the MPC contains the criteria for the grant of a variance. A municipality has no authority to modify these criteria by different provision in its zoning ordinance. The zoning hearing board is required to apply these criteria to the application for variance that has been presented.

The zoning hearing board may grant a variance provided that all of the following findings are made where relevant:

1. That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to such conditions, and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.
2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.
3. That such unnecessary hardship has not been created by the applicant.
4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.
5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

In the case of a use variance (as contrasted with a dimensional variance), in addition to the statutory criteria, the zoning hearing board must find one of the following (a) the physical conditions of the property are such that it cannot be used for a permitted purpose; (b) the property can be conformed for a permitted use only at a prohibitive expense; or (c) the property is valueless for any purpose permitted by the zoning ordinance. *Allegheny West Civic Council, Inc. v Zoning Bd. of Adjustment*, 689 A.2d 225 (1997).

In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of the MPC and the zoning ordinance. *See Planning Series No. 7: Special Exceptions, Conditional Uses and Variances.*

Reference

1. The MPC no longer provides the authority for a joint municipal planning commission as previously authorized by Article XI-A, which was repealed on Dec. 21, 1988 by P.L.1329, No.170. However, this legislation did not repeal the provision of a joint municipal planning commission under Section 801-A- (b) pertaining to Joint Municipal Zoning.

V. County Zoning

In Pennsylvania, counties have the power to enact zoning ordinances. The MPC limits that power to areas in municipalities that do not have their own zoning ordinances in effect. If a municipality whose land is subject to county zoning subsequently enacts its own zoning ordinance, the county zoning within and applicable to that municipality is repealed in total.

County zoning is different from municipal zoning in a significant way. Section 605 of the MPC says, "in any municipality, *other than a county* [emphasis added], which enacts a zoning ordinance, no part of such municipality shall be left unzoned." Pennsylvania case law supports that counties have authority to zone part and not necessarily all of the portions of the county that are not otherwise governed by a municipal zoning ordinance. Counties have the unique ability to use limited-area zoning to address particular land use and development issues, such as road or trail corridors, natural or historic resource protection, or active development areas like interchanges.

County zoning ordinances bear the same responsibility as municipal zoning ordinances to provide for all reasonable, lawful uses. Where county zoning covers multiple municipalities, it meets this responsibility same as a joint municipal zoning ordinance, by providing for all uses across the whole of the county-zoned area, not in each individual municipality covered. If a county elects to zone in part, case law says its zoning ordinance must provide for all uses or leave a sufficient amount of unzoned land available for all lawful purposes. The county cannot defend against an exclusionary challenge by leaving a token area unzoned and available for undesirable uses.

County zoning is not common in Pennsylvania. As of this writing, 12 counties have some form of county zoning. Seven counties – Cameron, Clinton, Fayette, Lycoming, Luzerne, Montour, and Schuylkill – have full-coverage county zoning, i.e., the county ordinance covers all municipalities not having their own zoning ordinances and provides for all uses in the county-zoned area. Five counties have limited-coverage zoning. Adams and Warren enacted zoning covering some municipalities upon their request, but not all unzoned municipalities. Somerset County zoning covers four interchange areas on US 219. Indiana County provides conservation zones around three county parks and one state park. Clarion and Indiana Counties enacted airport hazard zoning around county airports. (In addition to the above, Philadelphia, which is a co-terminus city and county, is fully covered by a city zoning ordinance.)

VI. Enacted Zoning Ordinances

Administration of the Zoning Ordinance

Once a municipal zoning ordinance is enacted, neither the planning agency nor the governing body is directly involved in its day-to-day administration. The MPC requires that two separate entities – a zoning officer and a zoning hearing board – be created for this purpose.

- **Zoning Officer**
  The day-to-day administration procedures provided for in the zoning ordinance are the responsibility of the zoning officer. The zoning officer must administer the zoning ordinance by its literal terms. The zoning officer can neither waive nor tighten any requirement of the zoning ordinance. The zoning officer has authority to interpret the zoning ordinance where its provisions are unclear, but where doubt exists must interpret in favor of the property owner and against any implied extension of the restriction (MPC 603.1). Although the zoning officer's specific administrative powers and duties should be specified in the zoning ordinance, the zoning officer's duties generally involve receiving, reviewing, and issuing permits for zoning purposes, maintaining records of applications and permits, performing inspections to determine compliance with the zoning ordinance, enforcing the zoning ordinance, keeping the zoning ordinance and map up-to-date, registering nonconforming uses, and accepting applications for and presenting facts at hearings before the zoning hearing board.

  There is no statewide certification program for zoning officers. Instead, the zoning officer is required to meet qualifications established by the municipality and must be able to demonstrate a working knowledge of municipal zoning.

  Municipalities may employ a zoning officer on a full- or part-time basis, may engage one via a contract, or may cooperate with one or more other municipalities to utilize a joint or shared zoning officer. Where there is a joint municipal zoning ordinance in accord with Article VIII-A of the MPC, the ordinance shall specify if there will be individual zoning officers for each participating municipality or one zoning officer for all.

- **Zoning Hearing Board**
  Any municipality enacting a zoning ordinance must also create a zoning hearing board. The zoning hearing board is created to help assure fair and equitable application and administration of the zoning ordinance. A zoning hearing board functions in a quasi-judicial capacity; that is, it is a "local court" for zoning matters. It must, however, follow the procedures prescribed by the zoning ordinance and by the MPC, and can neither make nor modify land use policy or change or modify the zoning ordinance.

  Section 909.1(a) of the MPC authorizes the zoning hearing board with exclusive jurisdiction to hear and decide the following:

  1. Substantive challenges to the validity of any land use ordinance, except curative amendments (which are heard by the governing body);
  2. Appeals from the determinations of the zoning officer, including but not limited to the following:
     a. The granting or denial of any permit
     b. The failure to act on an application for any permit
     c. The issuance or any cease or desist order
     d. The registration or refusal to register any nonconforming use, structure, or lot;
  3. Appeals from a determination by the municipal engineer or the zoning officer with regards to the administration of any floodplain or flood hazard regulations;
  4. Applications for variances from the terms of the zoning ordinance and flood hazard ordinance or such provisions within a land use ordinance;

5. Applications for special exceptions under the zoning ordinance or floodplain or flood hazard ordinance or such provisions within a land use ordinance;
6. Appeals from determinations regarding the administration of transfers of development rights or performance density provisions;
7. Appeals from the zoning officer's determination regarding preliminary opinions; and
8. Appeals from the municipal engineer's or zoning officer's determination in the administration of any land use ordinance regarding stormwater management and erosion and sediment control not involving subdivision, land development, or planned residential development applications.

The MPC authorizes two or more municipalities to create a joint zoning hearing board, either for administration of a joint municipal zoning ordinance (MPC 815-A) or for administration of separate individual zoning ordinances (MPC 904). The procedural requirements specified under Article IX of the MPC for municipal zoning hearing boards shall also apply to joint zoning hearing boards. *See Planning Series No. 6: The Zoning Hearing Board.*

Ordinance Interpretation

There are accepted "rules" to be followed in interpreting a zoning ordinance. An overall objective is to determine the intent of the governing body which, in the exercise of its legislative powers, enacted an ordinance. More specifically, ordinance language that is "plain and unambiguous and conveys a clear meaning" may be administered without need to resort to extensive interpretation. Words are to be constructed according to the rules of grammar and according to their common and approved usage. And, as long-established by the courts, interpretation should not disregard the letter of the ordinance under the pretext of pursuing its spirit; simply stated, words should neither be disregarded nor inserted to allow for the interpretation.

An ambiguity exists when the language of the ordinance is subject to two or more reasonable interpretations. The interpretation of an ambiguous ordinance is governed by the rules of statutory construction set forth in the Statutory Construction Act or 1972, 1 Pa. C.S. § 1501 *et seq.,* and as determined by the courts. An ordinance is to be constructed, if possible, to give effect to all of its provisions so that no provision becomes "mere surplusage."

Finally, because land regulation is a derogation of private property rights, Section 603.1 of the MPC requires that an ordinance "shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the proper owner and against any implied extension of the restriction."

Substantive Validity Challenges and Curative Amendments

A validity challenge to a zoning ordinance may be brought by a landowner either before the zoning hearing board in the form of a substantive challenge to the validity of the ordinance or before the governing body in the form of a curative amendment.

Section 916.1(b) of the MPC provides that "persons aggrieved by a use or development permitted on the land of another by an ordinance or map… shall first submit their [substantive] challenge to the zoning hearing board." Additionally, Pennsylvania courts have concluded that the prerequisite for such substantive validity challenge by an aggrieved person is an approved use or development of a property under the challenged ordinance.

Section 916.1 of the MPC establishes the procedures and criteria for the zoning hearing board's consideration of the substantive validity challenge.

The curative amendment is a hybrid form of challenge to the substantive validity of the zoning ordinance. It is both an appeal from and (if granted) an amendment to the zoning ordinance offered by the landowner to cure the alleged invalid ordinance.

In reaching its decision, the governing body or zoning hearing board must consider:

1. The impact of the proposal upon roads, schools, and public utility and service facilities;
2. The impact of the proposal upon regional housing needs;
3. The suitability of the site for the intensity of use proposed by the site's soils, slopes, woodlands, wetlands, aquifers, natural resources, and other natural features;
4. The impact of the proposed use on the site's natural features; and
5. The impact of the proposal on the preservation of agriculture and other land uses which are essential to public health and welfare.

Section 609.1 of the MPC establishes the procedure and criteria for the governing body's consideration of a curative amendment.

There is also a prescribed method within the MPC for municipalities to prepare their own municipal curative amendments. When the zoning ordinance or a portion thereof is determined to be substantively invalid by the municipality by formal action, there is a 30-day time limit during which a resolution setting forth specific findings regarding the declared invalidity must be passed. A municipal curative amendment correcting the declared invalidity must be enacted within 180 days of the initial declaration. This procedure, once initiated, places a limited moratorium on consideration of any landowner's curative amendments, which are identical or substantially similar to the invalidity declared by the pending municipal curative amendment. Once a municipal curative amendment is enacted, the municipality may not utilize this procedure again for 36 months except for circumstances involving change in statute or a Pennsylvania Appellate Court decision that imposes a new obligation upon the municipality.

Procedural Challenges to Enacted Zoning Ordinances

The validity of a zoning ordinance may be challenged on the basis that it was not enacted in conformance with the procedural requirements of the MPC found in Sections 607, 609, and 610. Such a challenge is called a "procedural challenge," and its objective is a determination that the enacted zoning ordinance or amendment is void for failure to comply with MPC-required procedures. A procedural challenge is heard by the court of common pleas (by contrast a substantive challenge must first be heard by the municipal zoning hearing board).

There were several notable Pennsylvania court decisions involving successful procedural challenges to ordinances that had been enacted many years and even decades before the challenge. As a consequence, the ordinances were determined to be *void ab initio,* that is without legal validity from the moment they were enacted. The Pennsylvania legislature responded to these decisions and the concerns the decisions generated among the municipalities by enacting legislative amendments to the MPC (Sections 1002.1-A and 108) and the Judicial Code (Section 5571.1) that limit the opportunity for bringing a procedural challenge.

Both the time to bring a procedural challenge and the challenger's burden of proof are addressed by Section 1002.1-A of the MPC. Under Section 1002.1-A, an individual bringing a procedural challenge within 30 days of enactment of the zoning ordinance need only establish that a municipality did not strictly follow the procedural requirements set forth in the MPC. However, where a procedural challenge is brought after 30 days, the municipality need only demonstrate substantial compliance with the procedural requirements. The challenger must prove that, because of the alleged defect in procedure, either the public was denied notice sufficient to permit participation, or those whose substantive property rights were or could be directly affected were denied an opportunity to participate.

In addition to Section 1002.1-A of the MPC, the General Assembly enacted Section 5571.1 of the Judicial Code, 52 Pa.C.S. § 5571.1 (Appeals from ordinances, resolutions, map, etc.). Like Section 1002.1-A of the MPC, Section 5571.1 of the Judicial Code provides presumptions of validity, times for bringing a challenge, and the challenger's burden of proof. It also provides that a determination that an ordinance is void from inception does not affect rights acquired by property

owners who, in good faith, relied on the validity of the ordinance prior to the determination that the ordinance is void.

Finally, Section 108 of the MPC (Optional notice of ordinance or decision; procedural validity challenges) authorizes publication of a public notice of an enacted ordinance. The purpose of such optional notice is to provide certainty of the procedural validity of the ordinance by limiting the time for bringing a procedural challenge. Such optional notice must be published once each week for two consecutive weeks in a newspaper of general circulation. Such optional notice may be published by either the governing body of the municipality or any resident or landowner in the municipality. The optional notice must contain all of the information required by Section 108(c). Where the optional notice has been published, a procedural challenge to the enacted notice must be brought within 30 days of the second publication of the optional notice. If the procedural challenge is not filed within the 30-day period, the ordinance is deemed to be reaffirmed and reissued on the date of the second publication of the optional notice

Section 108 specifically provides that an appeal shall be exempt from the 30-day period if the party bringing the appeal establishes that the application of the 30-day limitation would result in an unconstitutional deprivation of due process.

However, Section 108 further provides that the optional notice would not modify the time for bringing a procedural challenge under Section 1002-A of the MPC where the appellant had "adequate opportunity" to bring such challenge upon the enactment of the ordinance. As addressed by the courts, Section 108 does not abrogate the procedures established by Section 5571.1 of the Judicial Code (described earlier). Therefore, the appellant would need to show that the procedural irregularities were such that he or she was denied the opportunity to know about the proposed ordinance and was prevented from commenting on it.

The Section 108 optional notice offers a municipality a means to remedy longstanding (or recent) ordinances or amendments thereto that are believed to have been enacted in a procedurally deficient manner or where record of the actual enactment procedures is incomplete and uncertain.

A municipality minimizes the risk of a procedural challenge – and need not resort to the Section 108 optional notice – when its zoning officer and other administrative staff are fully informed about the MPC-required procedures for enacting an ordinance (including consultation with the solicitor) and strictly follow those procedures. If a procedural error occurs, the municipality should not hesitate to redo the deficient procedural step correctly. Sweeping the procedural error under the rug is neither a prudent or lawful response. Finally, the procedures taken by the municipality on a given ordinance should be well documented. A current and complete procedural record avoids delay and expense in preparing to defend against a procedural challenge, should one be filed.

Additional Considerations

Zoning is not a panacea for all of a community's land use problems. A zoning ordinance does not contain construction specifications. It cannot correct the mistakes of the past; rather, it attempts to prevent unwise development and development patterns from occurring in the future. It cannot itself address all a community's land use and development objectives, but should be complemented by a subdivision and land development ordinance, an official map ordinance, and by building, housing, and other such codes.

In its preparation stage, the zoning ordinance must be thoroughly deliberated and its districts clearly defined. It should be based upon existing and future needs, as documented in the comprehensive plan. The ordinance should not be exclusionary and should permit all feasible land uses and developments. Zoning standards should be reasonable, not excessive. Unnecessarily stringent standards often contribute to unhealthy community trends such as unaffordable housing, as well as infringe upon property rights. A municipality faces a difficult challenge to defend an ambiguous or an exclusionary ordinance in any court proceedings.

Even if a zoning ordinance is well conceived and adopted, the true test of its effectiveness lies in its administration. The zoning officer must completely understand his or her duties, and must have a working knowledge of both the local zoning ordinance and the planning code. The zoning hearing board must endeavor to understand its responsibility and

to act wisely on any matter that comes before it. Improperly issued variances can destroy the integrity of a zoning district and set undesired precedents for future requests.

In addition to proper preparation and administration, the planning agency and the governing body must periodically review the contents of the zoning ordinance. At a minimum, a planning agency must review the zoning ordinance no less frequently than it reviews the comprehensive plan. DCED suggests a review at least once every three to five years. The ordinance will require amendments from time to time to accommodate changes in the community, in land use concepts, and in the planning code. By analyzing change and by adjusting the zoning ordinance accordingly, the community will be prepared to defend the legality and constitutionality of its ordinance.

The integrity of zoning can be damaged not only by misuse of variances, but also by frivolous amendments. One such pitfall is unlawful "spot zoning" – a singling out of one lot or small area for different treatment from that accorded to similar surrounding land from which it is indistinguishable in character for the economic benefit (or detriment) of the property owners. For example, an individual desiring a use for his or her property that is not permissible within the zoning district might request a zoning amendment. If the request would treat this property differently from the surrounding land from which it is physically indistinguishable, and if the proposed use would be detrimental to public health, safety, and welfare, the request should be denied; grant of the request would result in unlawful spot zoning.

VII. Alternative Approaches in Zoning

The MPC specifically authorizes that zoning ordinances may contain provisions to encourage innovation and to promote flexibility, economy, and ingenuity in development. It also contains provisions authorizing increases in the permissible density of population or intensity of a particular use based upon expressed standards and criteria, as an incentive to encourage affordable housing or additional site amenities. A description of some of these approaches follows. A community considering adoption of any of the following zoning approaches should also review its subdivision and land development and other land use ordinances to ensure consistent standards among all.

While the MPC authorizes provisions encouraging innovation, the courts have on several occasions held that such planning initiatives lacked enabling authority under the MPC. The legislative response resulted in amendments to the MPC providing for such enabling authority – Article VII Planned Residential Development and Article VII-A Traditional Neighborhood Development. The law remains unsettled as to other innovations and, in similar fashion, may require further amendment to the MPC.

Lot Averaging

Lot averaging is a means of gaining design flexibility for the purpose of avoiding encroachment into environmentally sensitive areas or preserving historic structures on larger lots. It permits certain lot sizes to be reduced below the standard minimum, provided certain other lots are increased by the same size, as long as the resulting average lot size is not less than the stated minimum for that specific zoning district. The number of permitted dwelling units is usually not decreased, and common open space is not created.

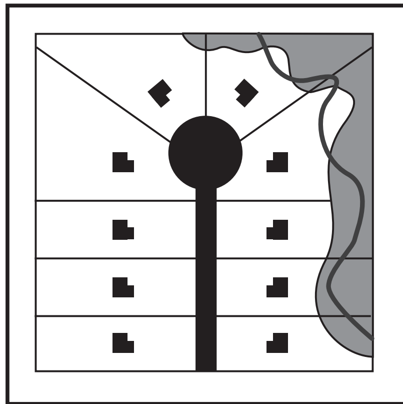
Clustering

Clustering provides more design flexibility than lot averaging and conserves common open space, as well. Clustering involves the arrangement of residential building lots in groups through a reduction in lot area and building setback requirements while still adhering to overall permitted density regulations or perhaps utilizing a modest density incentive. This allows the remaining area of the development to be incorporated as open space, often based upon the preservation of environmentally sensitive areas (i.e., woodlands, wetlands, prime farmland, floodplains, or severely steep slopes). The option of clustering is intended to produce several desired results including the creation of recreational opportunities and open space, attractive housing layouts, the preservation of natural or historic features and resources, and a reduction of infrastructure and maintenance expenses.

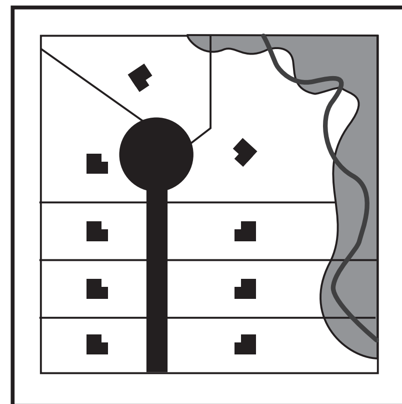
Conservation Zoning

Conservation zoning uses the development process to conserve a community-wide network of open space. It is an improved form of cluster development that requires open space to be delineated first with development designed around the special features of the site. Full density is achieved only when at least 50 percent of the buildable land is set aside as open space. Conservation zoning is a basic use-by-right that is not required to follow a special procedure such as a conditional use or special exception. Communities that adopt this approach no longer allow, or impose severe density penalties on, conventional development without open space. Conservation zoning standards would also require the adoption of similar standards in the subdivision and land development ordinance.

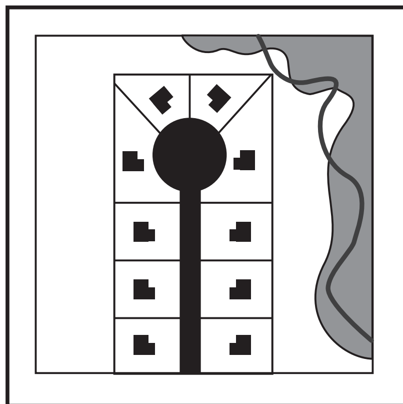
Alternative Zoning Methods – Diagram



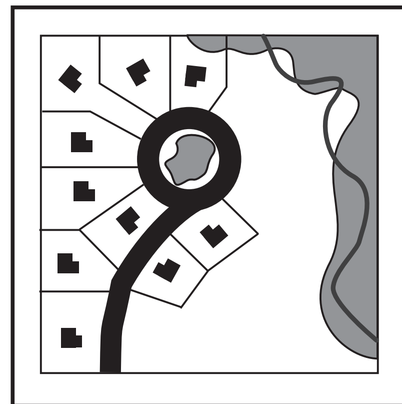
Conventional



Lot Averaging



Clustering



Conservation Subdivision

Modified from a drawing from Linking Landscapes: A Plan for the Protected Open Space Network in Chester County, PA, 2002. Reprinted with permission of the Chester County Planning Commission, West Chester, PA.

Transferable Development Rights (TDRs)

"Transfer of development rights (TDR) is a market-based technique that encourages the voluntary transfer of growth from places where a community would like to see less development (called sending areas) to places where a community would like to see more development (called receiving areas)."[1] The underlying principle is that real property is a bundle of rights rather than a single entity. Just as mineral rights can be separated from the land, so can the right to develop. The development right can be transferred from one site to another, from an area to be preserved or protected to an area where growth can be accommodated and is desirable. A willing developer would pay for the development rights, and the property owner whose land is being restricted would therefore be fairly compensated.

Implementation of a successful TDR program requires the designation of both sending and receiving areas. Sending areas can be agricultural land, open space, natural and environmentally-sensitive areas, and places that are historically and culturally significant. Receiving areas can be places that the community has agreed are appropriate for extra development because they are close to jobs, shopping, schools, transportation, and other urban services. Development rights are conveyed by a deed recorded in the county recorder of deeds office. This deed must bear the endorsement of the local municipal governing body having jurisdiction over the property or properties involved in the conveyance of rights.

The MPC permits transfer of development rights beyond the municipal boundary, from sending areas in one municipality to receiving areas in another, in three situations: 1) where the municipalities are administering a joint municipal zoning ordinance; 2) where the municipalities are administering separate, individual zoning ordinances under a cooperative agreement to implement a multimunicipal comprehensive plan; or 3) where the municipalities are administering separate, individual zoning ordinances and have authorized TDR between them by written agreement.

The PA Local Government Training Partnership TDR fact sheet provides additional information and it may be accessed online at https://palocalgovtraining.org/pdfs/factsheets/TransferableDevelopmentRight-LandUse_2013.pdf.

Effective Agricultural Zoning (EAZ)

Because of the value and abundance of fertile agricultural ground that spans the commonwealth, prime farmland is one of the resources most often targeted for protection. On the national, state, and local levels several methods exist to determine prime agricultural land as well as protect it. Nationally, prime agricultural land, as defined by the United States Department of Agriculture, is agricultural land that contains soils of the first, second, and third classes. This is a good indication of prime soils; however, when creating a municipal ordinance, additional consideration should be given to a number of factors including surrounding land use, development pressures, and other local factors.

Effective agricultural zoning (EAZ) can take several forms, each emphasizing the preservation of areas of agricultural importance by limiting the allowable density of development. Other controls such as maximum lot sizes, permanent conservation easements, and locational criteria are commonly included with EAZ to further guarantee that the best agricultural land remains undeveloped and protected.

Some townships in Pennsylvania have utilized the powers under Agricultural Area Security Law, Act 43 of 1981, 3 §§ P.S.901-915 to establish agricultural security areas (ASA) as a land use tool in combination or addition to agricultural zoning. Most importantly, ASAs protect farmers from local nuisance complaints. Other state programs include Agricultural Conservation Easements (ACE) and the Pennsylvania Farmland and Forest Land Assessment Act 319 of 1974 (a.k.a., Clean and Green Act). These programs protect our agricultural lands as well as help municipalities define their agriculturally dominant areas. If there is a large agricultural component to a community, it may opt to create an agricultural zone in addition to ASAs and ACEs, which would afford another layer of protection to a local farm or farm community. Whatever the final approach selected, municipalities interested in pursuing this approach to zoning must have a firm base of support within the local farming community and should not be subject to significant and ongoing development pressures occurring within the natural path of growth.

Effective agricultural zones, for example, are zones that may provide for services and facilities to support a township's agricultural and farming related businesses, permitting agriculturally related commercial uses that can be located among an area devoted to farming. Generally, effective agricultural zoning does not permit large residential developments or unrelated commercial or industrial uses. Other than agriculture and agriculturally related businesses, effective agricultural zones may provide for a few small residential lots depending on the parent tract size. The courts have determined that agricultural zones providing for a fixed number of residential lots regardless of the parent tract size to be unreasonable. This is to allow for a potential secondary residence for future generations. *See Planning for Agriculture,* from DCED.

Performance Zoning

Traditional zoning establishes an array of zoning districts under which specific permitted uses are listed. A zoning variant known as performance zoning relies not on a list of specific permitted uses, but rather on a list of specific quantifiable criteria which must be met by any proposed use. Performance zoning originated as an industrially related concept. Standards were established for such elements of industry as particle emissions, noise, glare, and vibration. When a particular use could prove that it was able to meet these certain standards, it would then be accepted as a permitted use in that district.

Performance zoning has now been expanded to include land uses other than industry, in particular residential uses. The performance standards typically applied in residential instances may include the reduction of impact on environmentally sensitive areas (i.e., floodplain, wetlands, prime agricultural land, steep slopes, forest, etc.), the allocation of required recreational land and open space, total tract size, density, the ratio of impervious surfaces, and a minimum percentage of community open space. Such environmental standards are instituted for the purpose of natural resource protection.

Environmental performance zoning attempts to relate the intensity of development to the site's natural carrying capacity. This type of performance zoning differs from the industrial method by determining a quantity or degree of permissible development and consequently the number of lots allowable, not whether a particular use is permitted. Performance zoning standards provide a greater degree of specific control to the municipality while also affording developers increased design flexibility. Although this approach does offer several advantages, it also creates an additional burden with respect to the administration and enforcement of the zoning ordinance.

Planned Residential Development

Article VII of the MPC authorizes municipalities to enact, amend, and repeal provisions within a zoning ordinance fixing standards and conditions for planned residential development (PRD). PRD provisions combine elements of zoning and subdivision and land development regulation. It brings together mixed residential and non-residential development and open space and recreational facilities within the same development. PRD regulations are ideal for promoting master planning and innovative, flexible design of larger tracts of land in the municipality. The basic concept behind PRD regulations is the establishment by the municipality of certain general overall density, water supply, sewage disposal, and percentage of open space standards, and the permission for the developer to develop with considerable flexibility within these established criteria.

A properly designed PRD can benefit both the developer and the municipality. Generally, although not necessarily, the PRD may permit the developer to increase overall density in return for devoting a percentage of total land for common open space. The common open space is usually owned and maintained by a homeowners association or by the developer. The developer may benefit by having to install fewer roads and utility lines, while the municipality benefits by centralization of service areas and less maintenance. Also, the developer is permitted added design flexibility. Since density can be increased in some areas, other areas that should not be developed can be left untouched (e.g., wooded areas, a floodplain, etc.). It is conceivable that the community may gain title to some or all of the common open space, adding further to the municipal gain from utilizing the PRD.

PRDs can be allowed throughout the community or restricted to specific districts. Also, varying degrees of density can be permitted among those districts authorized for planned residential development. For example, PRD might be permitted in a "residential-agricultural" district at a density of two or three dwelling units per acre with 40 percent of the total land area in common open space; in a "residential" district, perhaps five to nine or more dwelling units per acre can be permitted with 30 percent of the total land area in common open space.

It is probably not advisable for a community to allow for PRD everywhere within its borders. Rather, this type of development could be channeled to those areas where it is felt that it would be most beneficial; in some "agricultural" districts, perhaps with reduced density in a "conservation" district, in most "residential" districts, or perhaps in a neighborhood oriented "commercial" district. Since a significant feature of PRD is the preservation of open space, thought should be given to any outstanding natural features or historic sites worthy of preservation. PRD can then be used as a tool to achieve some type of open space preservation. It can also be extremely useful to provide the transfer of a development rights option as part of the PRD regulations.

PRD is a concept with several advantages over a typical development. The process differs sharply from those followed in other land development situations in that the PRD regulations provide for flexibility in site and design, and not for rigidly imposed standards. For this reason, PRD enhances subdivisions designed for such criteria as solar orientation and energy conservation, as well as for conserving natural resources. This flexibility leads the way to negotiations with the prospective developer in attempting to produce an acceptable and quality development for both the community and for the developer. The PRD is essentially a straightforward procedure. However, considerable time and effort must be devoted to both its development and to its ultimate administration.

Article VII of the MPC provides express authorization for a municipality to provide for PRDs in its zoning ordinance. Sections 702 and 705 of the MPC require a municipality providing for PRDs to set forth standards, conditions, and regulations for evaluation of such developments in the zoning ordinance and require consistency with the provisions of Section 705 of the MPC. The MPC further establishes procedures for consideration of PRD applications, including requirements for tentative and final approval of a planned residential development. These requirements include the holding of a public hearing and the making of findings by the governing body on the tentative approval. According to the MPC, upon final approval, a PRD development plan sets the standards by which development must take place and the zoning and subdivision and land development regulations otherwise applicable shall cease to apply to the property. Additionally, Section 712.2 of the MPC establishes specific enforcement remedies for violation of the PRD provisions contained in a zoning ordinance.

Traditional Neighborhood Development

Article VII of the MPC authorizes municipalities to utilize traditional neighborhood development (TND) as a means – among other objectives – to encourage innovations in residential and non-residential development and redevelopment. TND promotes a mixed-use form of development so that the growing demand for housing and other development may be met by greater variety in type, design, and layout of dwellings and other buildings and structures. In addition, TND promotes conservation and more efficient use of open space ancillary to said dwellings and uses. The MPC authorizes a zoning ordinance to establish a zoning district (or districts) reserved for TND, or allow TND as a permitted use in one or more zoning districts. Although not specifically expressed by the MPC, the TND provisions are in many ways supportive of a form-based zoning approach, and Section 708-A of the MPC authorizes the development of a manual of written and graphic design guidelines, which may be amended to either the county or municipal zoning ordinance, the subdivision and land development ordinance, or both.

Many municipalities have searched for a way to reintroduce traditional neighborhood and small town character to their respective areas. The concept of TND has provided a solution through zoning. The TND attempts to recapture the village and town square flavor of a pedestrian oriented setting. Traditional neighborhood development regulations can encourage a pleasant and functional mix of housing, businesses, and services in proximity to each other, and encourage pedestrian, bike, and transit facilities along with traffic calming measures for cars and trucks.

Sidewalks, parks, and ample open space along with the opportunity for viable public transportation are essential elements to the success of the TND. This form of development can occur either as an extension of existing areas, as a form of urban infill, or as an independent entity. As with many of these alternative approaches to zoning, modifications to otherwise strict density and dimensional requirements may be necessary. Large sites are usually required along with some level of coordination with adjacent developments. Overall, the positive impacts of a TND can be felt through an increase in safety and a resulting enhancement in community camaraderie.

Article VII-A of the MPC authorizes municipalities to provide for and fix standards and conditions for TNDs. It requires consistency with Section 706-A of the MPC.

Form-Based Zoning

Form-based zoning (a.k.a. form-based codes) is an alternative to conventional, Euclidean zoning. Euclidean zoning focuses on the segregation of land use types, permissible land uses, and the control of these uses and their development intensity through numerical parameters such as floor area ratio, dwelling units per acre, height limits, setback, parking ratios, etc.[2] Form-based zoning instead focuses on the physical form and design of the community and development.

Rooted in the neo-traditional urban design principles, form-based zoning has been developed by planning and urban design professionals over the last twenty years to overcome the challenges associated with suburban development that proliferated during the post-World War II period. Prior to this period, cities were generally organized into and developed around mixed-use walkable neighborhoods.

Form-based zoning focuses primarily on the physical form and design of the built and non-built environments, and deemphasizes the conventional zoning methods for regulating land use. It provides for an appropriate mix of uses based on the existing development framework by emphasizing the design context form and functional relationships between and among buildings and surrounding land uses and their specific functional uses. As a result, form-based codes are often expressed through visual techniques including illustrations, conceptual drawings and renderings, and even pictures of comparable developments to convey the community's desired development objectives.

According to the Form Based Codes Institute (FCBI), "Form-based codes foster predictable built results and a high-quality public realm by using physical form (rather than separation of uses) as the organizing principle for the code. They are regulations, not mere guidelines, adopted into city or county law. Form-based codes offer a powerful alternative to conventional zoning."[3] The FCBI also prescribes the following contents of a form-based code:

- **Regulating Plan.** A plan or map of the regulated area designating the locations where different building form standards apply based on clear community intentions regarding the physical character of the area being coded.
- **Public Space Standards.** Specifications for the elements within the public realm (e.g., sidewalks, travel lanes, on-street parking, street trees, street furniture, etc.).
- **Building Form Standards.** Regulations controlling the configuration, features, and functions of buildings that define and shape the public realm.
- **Administration.** A clearly defined application and project review process.
- **Definitions.** A glossary to ensure the precise use of technical terms.
- **Architectural Standards.** Regulations controlling external architectural materials and quality.
- **Landscaping Standards.** Regulations controlling landscape design and plant materials on private property as they impact public spaces (e.g., regulations about parking lot screening and shading, maintaining sight lines, ensuring unobstructed pedestrian movement, etc.).

- **Signage Standards.** Regulations controlling allowable signage sizes, materials, illumination, and placement.
- **Environmental Resource Standards.** Regulations controlling issues such as stormwater drainage and infiltration, development on slopes, tree protection, solar access, etc.
- **Annotation.** Text and illustrations explaining the intentions of specific code provisions.

Many Pennsylvania municipalities in their quest to utilize a form-based zoning approach have relied on the following provisions of the MPC to do so:

- Article VII, Traditional Neighborhood Development (TND), as discussed above.
- Section 603.7(c)(7) authorizes the use of zoning to encourage innovation and to promote flexibility, economy and ingenuity in development, including subdivisions and land developments as defined by the MPC.
- Section 603.7(g)(2) specifies that zoning ordinances "shall provide for protection of natural and historic features and resources," which consist of the historic structures and features comprising many of Pennsylvania's boroughs, cities, and unincorporated villages. In the context of form-based zoning, this provision is used to reinforce and emulate a community's historic resources and their contributing historic design elements and features through infill development or new land development.

Two contrasting examples in the use of form-based zoning are Lititz Borough and Penn Township in Lancaster County. In Lititz, "borough planners looked for a way to ensure conformity and consistency without quashing creativity," to preserve the borough's historic charm and pedestrian-oriented development patterns. In nearby rural Penn Township, form-based zoning was adopted to reverse the trend of suburban development and achieve "a clear vision for quality future development."[4]

Overlay Zoning

Overlay zoning is one particular method for adding flexibility to a zoning ordinance and its administration. Unlike fixed zoning districts, overlay districts are placed over the fixed districts and apply additional provisions that are either more restrictive or expansive, or that may provide for different uses or design standards than the underlying district regulations.

Overlay zoning can be a useful tool to help promote development that is compatible with, enhances, and protects the function and value of a natural resource. Overlay districts also can be used for infrastructure planning. They can help to manage safety, access, and mobility. They can also be used to preserve scenery and conservation areas. Clustering, performance zoning, planned residential development, traditional neighborhood design, and historic district preservation are types of zoning overlays that add site flexibility. Here, overlay zoning can benefit both the municipality and individuals seeking to develop property.

Overlay zoning can help communities achieve the following planning objectives:

- To preserve open space (e.g., connect parks to walking trails, maintain scenic views, and protect wildlife habitats)
- To manage natural resources (e.g., protect wetlands and floodplains, encourage forest re-growth, and protect steep slopes and landslide prone soils)
- To preserve historic treasures (e.g., specify design standards and allow flexibility in uses for certain properties)
- To encourage improved development design (e.g., help to define community character and facilitate flexibility for developers by enhancing subdivision designs requirements).

More information regarding overlay zoning may be obtained through The PA Local Training Partnership's Overlay Zoning Fact Sheet, which accessible online at https://palocalgovtraining.org/pdfs/factsheets/OverlayZoning-LandUse_2013.pdf.

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VIII. Conclusion

The zoning ordinance regulates the use of land within a municipality. To be truly effective, it must be based upon sound data and must adequately reflect the policy goals of the community. Although the zoning ordinance is a document that is enacted only after long hours of deliberation and months of professional consultation and public debate, it must be properly administered and must be reviewed periodically for necessary changes in order to be continually effective. Failure to do either could well defeat the purposes of the ordinance.

There are several methods of lending flexibility to the zoning ordinance and to its administration. Clustering, performance zoning, planned residential development, and other similar approaches add flexibility to site design. They can benefit both the developer and the municipality, and should warrant consideration by all communities.

A zoning ordinance can be a positive force for quality community development depending upon the amount of thought that goes into its preparation and the effectiveness with which it is administered. However, with adequate planning and foresight, a community can be prepared to meet the demands of providing for substantial growth and development and also providing its residents with a better place to live and work.

IX. Planning Assistance from DCED

DCED's Governor's Center for Local Government Services (Center) provides a full range of technical and financial services to all of Pennsylvania's local governments. The Center is the principal state agency responsible for helping with planning and land use matters discussed in this publication.

Local government officials, planners, and other interested individuals have several sources of assistance from the Center:

- **Toll-free telephone number** – 888-223-6837. Callers will be connected with staff that has knowledge of planning, land use, zoning, subdivision and land development, and the PA Municipalities Planning Code.
- **Website –** dced.pa.gov/lgs. There are helpful pages under Community Planning, plus information on the topics listed below.
- **Publications –** dced.pa.gov/publications. This and the other nine Planning Series publications listed in the Preface can be downloaded and printed for free, or hard copies can be purchased at cost. The website also has publications with suggested provisions for floodplain management ordinances, plus publications on many topics from fiscal management to intergovernmental cooperation to open meetings.
- **Training –** PAtraininghub.org. DCED provides funding for local government training programs via the PA Local Government Training Partnership. There are training courses, videos, and online instruction on a variety of topics, including planning and land use, plus ten fact sheets on planning and land use topics.
- **Land use law library –** www.landuselawinpa.com. DCED and the PA Local Government Training Partnership maintain an online library of significant court cases on zoning, subdivision and land development, and other land use topics.
- **Planning and land use eLibrary –** http://elibrary.pacounties.org. DCED and the County Commissioners Association of Pennsylvania maintain an online library of comprehensive plans, zoning ordinances, and subdivision and land development ordinances in effect in Pennsylvania counties, cities, boroughs, and townships.
- **Financial assistance –** dced.pa.gov/program. Currently DCED provides funding for local government planning through the Municipal Assistance Program. MAP offers up to 50 percent grants for costs of undertaking comprehensive plans, zoning ordinances, subdivision and land development ordinances, and more.

X. Other Planning Assistance

Assistance and training on planning and land use are available from other sources:

- **County planning agencies –** Pennsylvania counties have a long tradition of being a source of capacity and expertise in planning and land use. Currently, every county has a planning commission, department, or both, or other agency like a development department that handles planning matters. Every county has staff involved in planning. Many county planning agencies offer assistance to local governments in their counties.
- **American Planning Association (APA) –** The Pennsylvania Chapter has an annual conference with many speakers and sessions on topics from local to national interest, plus training workshops and other educational events and information: http://planningpa.org. The national organization has an annual conference, publications, and a variety of audio, web, and e-learning resources: www.planning.org.
- **Local government associations –** In addition to programs through the PA Local Government Training Partnership, Pennsylvania's statewide associations representing different categories of local governments also offer annual conferences and training programs, including planning and land use, to their member local governments.
- **Penn State Extension –** Statewide Extension programming includes courses, webinars, and publications on community issues including planning and land use. Within that is the Pennsylvania Municipal Planning Education Institute which offers training programs on planning, zoning, and subdivision and land development: http://extension.psu.edu/community.
- **Universities and colleges –** Several Pennsylvania universities and colleges offer degree programs in planning. Others offer planning-related courses in geography or design degrees. Many have a community service objective and assist community groups and local governments with faculty and/or student service projects.

Appendix I: Initial Zoning Ordinance Adoption Procedures

1. Draft ordinance and map are prepared by the planning agency.

2. In preparing a proposed ordinance, the planning agency must hold at least one public meeting advertised via public notice defined in the MPC as published two successive weeks in a newspaper of general circulation, the first notice not more than 30 days and the second notice not less than seven days from the date of the meeting.

3. Upon completion of its work, the planning agency shall present to the governing body the proposed ordinance along with any recommendations.

4. A copy of the proposed ordinance must be forwarded to the county planning agency for recommendations at least 45 days prior to the required public hearing.

5. Before voting on enactment, the governing body must hold a public hearing on the proposed ordinance. The public hearing must be advertised via public notice as defined in the MPC *(see #2 above)*. Also, mailed or electronic notice (as defined in the MPC and prescribed in Section 109 of the MPC) must be provided by the municipality to an owner of land or underlying mineral rights in the municipality who has made timely request for such notice.

6. Before voting on enactment, the governing body must publish notice of intent to enact the proposed ordinance once in a newspaper of general circulation at least seven and no more than 60 days prior to passage. Notice must include the time and place of the meeting at which enactment is to be considered, a reference to a place within the municipality where copies of the proposed ordinance may be examined without charge or obtained for a charge not greater than the cost thereof. Notice also must include the full text of the ordinance, or the title and summary prepared by the solicitor that "sets forth all the provisions in reasonable detail," with full text supplied to the newspaper and an attested copy filed in the county law library.

> If after notice to the public in #5 and/or #6 the proposed ordinance is substantially amended, there must be published notice of a summary of the amendments at least 10 days prior to enactment. If substantially amended after the public hearing in #5 and before the notice to enact in #6, the amendments notice can be combined with the notice to enact (provided publication is at least 10 days prior to enactment) or published separately. If substantially amended after the notice to enact in #6, the amendments notice must readvertise the proposed ordinance in reasonable detail along with a summary of the amendments.

7. The governing body must vote on enactment within 90 days after the last public hearing.

8. A copy of the enacted zoning ordinance must be placed in the municipal ordinance book as required by the ordinance provisions set forth in the respective municipal codes. Within 30 days after enactment, a copy of the ordinance must be forwarded to the county planning agency.

Appendix II: Zoning Ordinance Amendment Procedures[1]

1. A proposed amendment to the zoning ordinance is submitted to the municipality.
2. If the proposed amendment was not prepared by the municipality's planning agency, the governing body must submit the amendment to the planning agency for recommendations at least 30 days prior to the required public hearing.
3. The proposed amendment must also be forwarded to the county planning agency for recommendations at least 30 days prior to the required public hearing.
4. Before voting on enactment, the governing body must hold a public hearing on the proposed amendment. The hearing must be advertised via public notice defined in the MPC as published two successive weeks in a newspaper of general circulation, the first notice not more than 30 days and the second notice not less than seven days from the date of the public hearing. Also, mailed or electronic notice (as defined in the MPC and prescribed in Section 109 of the MPC) must be provided by the municipality to an owner of land or underlying mineral rights in the municipality who has made timely request for such notice.
5. If the amendment involves a change in the zoning map, notice of the public hearing must also be conspicuously posted by the municipality at points deemed sufficient by the municipality along the affected property(ies) at least one week prior to the public hearing. Also, notice of the public hearing, containing the location, date, and time of the public hearing, must be mailed by the municipality at least 30 days prior to the public hearing by first-class mail to the addresses to which real estate tax bills are sent for all properties located within the area proposed for rezoning.
6. Before voting on enactment, the governing body must publish notice of intent to enact the proposed amendment once in a newspaper of general circulation at least seven and no more than 60 days prior to passage. Notice must include the time and place of the meeting at which enactment is to be considered, a reference to a place within the municipality where copies of the proposed ordinance may be examined without charge or obtained for a charge not greater than the cost thereof. Notice also must include the full text of the ordinance, or the title and summary prepared by the solicitor that "sets forth all the provisions in reasonable detail," with full text supplied to the newspaper and an attested copy filed in the county law library.
7. A copy of the enacted amendment must be placed in the municipal ordinance book as required by the ordinance provisions set forth in the respective municipal codes. Within 30 days after enactment, a copy of the amendment must be forwarded to the county planning agency.

If after notice to the public in #4 and/or #6 the proposed amendment is substantially changed, or revised to include land previously not affected by it, the following must occur:

1) The governing body must hold a public hearing on the revised amendment, advertised via public notice as described in #4.

2) If the revised amendment includes lands not in the original proposed amendment, notice of the public hearing must be posted and mailed as described in #5.

3) There must be published notice of a summary of the changes at least 10 days prior to enactment of the amendment. The notice may be published in combination with a public hearing notice or notice to enact, or published separately. Municipalities should consult with their solicitors to assure proper publication.

4) Any revision to a proposed amendment, whether or not substantial, must be newly submitted to the municipal and county planning agencies for a 30-day period for review and recommendations.

Reference

1. Note: Where a municipality proposes comprehensive amendments to an existing zoning ordinance, it may in effect be repealing and replacing the existing ordinance and require compliance with procedures for initial enactment of a zoning ordinance instead of procedures for amendment.

Pennsylvania Department of Community & Economic Development
Governor's Center for Local Government Services
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

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