

PLANNING FOR DEVELOPMENT AND SEWAGE INFRASTRUCTURE: CAN WE BE CONSISTENT?

An Environmental Law Institute Issue Paper

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Pennsylvania sewage facilities plans and comprehensive land use plans should carry out a consistent vision of growth, development, and conservation.

Pennsylvania's prosperity depends upon both the economic efficiency of its growth and development and the health of its lands and waters. Two state laws adopted nearly forty years ago set the rules for sewage facilities and land use. Pennsylvania's Sewage Facilities Act, enacted in 1966, requires every municipality to adopt an official "sewage facilities plan" and to revise it continuously as circumstances change.² The Municipalities Planning Code (MPC), enacted in 1968, empowers municipal governments to plan and zone for land use and development.³ Yet key weaknesses in both laws have made it difficult to ensure that a municipality's development plan ("comprehensive plan") and the sewage plan (the "official plan") support one another.

In 1998, the 21st Century Environment Commission recommended that Pennsylvania "integrate water and wastewater planning with watershed plans and local land use plans." The Commission specifically recommended that the Commonwealth "address the compatibility of Act 537, the Sewage Facilities Act, with local land use planning authorized by Act 247, the Municipalities Planning Code."⁴ The recommendation was not carried out.

Inconsistency produces adverse effects for Pennsylvania communities.

Recent studies in Pennsylvania by the Brookings Institution,⁵ the Allegheny Conference on Community Development,⁶ the

Pennsylvania Prosperity Coalition,⁷ 10,000 Friends of Pennsylvania,⁸ the Environmental Law Institute,⁹ Taxpayers for Common Sense¹⁰ and the National Academy of Sciences,¹¹ document the costly consequences of separating infrastructure planning from plans for growth in Pennsylvania communities. Common problems include:

- Insufficient ratepayer and taxpayer funding to support aging sewer systems in slow-growing or declining cities and boroughs.
- Duplication of existing infrastructure by the approval and construction of new public or private sewage facilities or community systems in municipalities adjacent to areas that have existing treatment capacity.
- Common use by townships of zoning and subdivision regulations that require large-lot (one acre or greater) forms of development simply in order to avoid dealing with sewers.¹² The Pennsylvania Prosperity Coalition (a group of builders, Realtors, and manufacturers) notes that this practice often produces "irrational, inefficient, and sprawling development."¹³ This, in turn, leads to more traffic on the roads and to more costly public services including fire protection and school buses.¹⁴ A related problem is "septic sprawl" – construction of single family homes and scattered retail establishments that rely on on-lot sewage disposal but that receive minimal scrutiny under either local zoning regulations or sewage facilities plans.¹⁵

- Leapfrog development that results in the division of farm and forestlands into parcels that cannot sustain farming, forestry, or wildlife. Because of inefficient land development, for every household added to the Commonwealth in the 1990s, nearly four acres of land were converted to developed uses.¹⁶
- Sewage facilities plans that are modified reactively in response to private development proposals. Most Pennsylvania sewage facilities plans consist of old plans supplemented by dozens of individual planning “modules” that support development proposals rather than a municipal development strategy.¹⁷
- Rural townships that rely on sewage facilities planning (and on-lot certification) as virtually their only form of development planning, because sewage facilities planning is mandatory, but comprehensive planning and zoning is not. This forces the Pennsylvania Department of Environmental Protection to address development issues that should have been resolved locally through the MPC’s land use planning process.

The MPC and Act 537 were ahead of their time in the 1960s, but are now desperately in need of modernization – and especially the creation of accountability between decisions about development and infrastructure.

Problem: The MPC does not require that sewage facilities plans be consistent with the comprehensive land use plan and zoning ordinance.

Although the MPC was enacted two years after the Sewage Facilities Act and has been amended several times since then, it makes *no reference to that Act or its requirements*. The

MPC allows – but does not require – the “community facilities and utilities” element of the municipal comprehensive plan to include a plan for “sewerage and waste treatment” along with a dozen other possible types of facilities.¹⁸ But this reference provides no guidance on the relationship of this permissive element of the comprehensive plan, which is advisory, to the official sewage facilities plan, which actually regulates where sewers and sewage facilities are provided.

The MPC also provides that a comprehensive plan “may identify those areas where growth and development will occur so that a full range of public infrastructure services, including sewer...can be adequately planned and provided as needed to accommodate growth.”¹⁹ But identification of such areas is not required, and again there is neither a consistency requirement nor a link to the official sewage facilities plan.

In 2000, the legislature amended the MPC (Acts 67/68) to require municipal authorities, water companies, and other municipalities to give *notice* of plans to extend new mains, including sewer mains, to a proposed development that has not received any municipal approvals, in order to allow the affected municipality to “comment” on whether the proposed expansion is generally consistent with its zoning.²⁰ But the MPC itself does not confer authority to disapprove the extension of service.

Under Acts 67/68, multi-municipal and county-municipal cooperative plans may designate growth areas, potential future growth areas, and rural resource areas, and may provide that “publicly financed” municipal infrastructure extensions are not intended to serve the rural resource areas.²¹ An optional “specific plan” for nonresidential areas may include standards addressing design of sewage and other facilities.²² These optional planning tools do not control the official sewage facilities plan without separate action on that plan.

Problem: The Sewage Facilities Act does not expressly require consistency with MPC comprehensive plans.

Act 537 provides that every sewage plan shall “take into consideration all aspects of planning, zoning, population estimates...so as to delineate with all practicable precision” areas which are likely to need community systems, and where such need is not reasonably foreseeable.²³ The Act also requires that sewage facilities plans must be reviewed by municipal planning agencies for “consistency with programs of planning for the area,” but it does not expressly mandate that they be consistent.²⁴ The absence of an explicit link has led to observations that comprehensive planning “has no binding effect on sewage facilities decisions.”²⁵

The missing connection is not supplied by DEP’s sewage facilities regulations. Under the regulations, sewage facilities plans must “delineate and describe” municipal land use designations, zoning and subdivision regulations, comprehensive plans, and other existing land and water resources plans.²⁶ In evaluating sewage facilities alternatives, municipalities are required to consider “consistency between the proposed alternative and the objectives and policies of...comprehensive plans.”²⁷ If the sewage facilities plan or plan revision identifies an inconsistency, the municipality must document that the appropriate agency has concurred with the “method” proposed to resolve the inconsistency.²⁸ Comments by planning officials are to be considered, but this requirement is deemed satisfied if sixty days have passed without comment.²⁹

The DEP’s guide for Sewage Facilities Act update revisions says that the comprehensive plan and the sewage facilities plan must “complement and support each other” and that conflicts “should be resolved before the municipality commits” to implementing the

sewage facilities plan.³⁰ But the fundamental connection is not a requirement.

Problem: Municipalities can approve sewage facility plans for new development inconsistent with comprehensive plans.

Sewage facilities plan revisions for new land developments must include analysis of whether each sewage alternative “is consistent” with the comprehensive land use plan.³¹ The regulations provide that a municipality *may* refuse to adopt a proposed revision for new land development if the plan “is not consistent with municipal land use plans and ordinances, subdivision ordinances or other ordinances or plans for controlling land use or development.”³² But such rejection is *not required* and an inconsistent plan revision may be adopted. Indeed, in a final rulemaking in 1997 the Environmental Quality Board (EQB) deleted a proposed requirement that would have provided that a municipality “may not adopt a proposed revision to an official plan, conditional or otherwise, until it determines that the proposal complies with sewage related municipal zoning, land use or other municipal comprehensive plans.”³³

Problem: The Sewage Facilities Act and regulations require DEP to grant developers’ requests for “private revisions” to sewage facilities plans to support development that is inconsistent with comprehensive planning and land use regulations.

Under the Sewage Facilities Act a property owner may ask the DEP to order a revision to a municipality’s sewage plan when the owner contends that the municipality has refused or failed to implement or revise the plan adequately to meet the owner’s “sewage disposal needs.”³⁴ The DEP must give the municipality and relevant municipal or county planning agencies up to 45 days to comment

and must consider comments and “the reasons for denial advanced by the municipality.”³⁵ But under a 1994 amendment to the Act, the DEP “*may not* refuse to order a requested revision because of inconsistencies with any applicable zoning, subdivision or land development ordinances.” However the DEP may make its order granting the private revision “subject to any limitations *properly placed* on the development” under such ordinances or court orders.³⁶

Until 1997, the sewage facilities regulations provided that the DEP would not consider any request for a private revision related to subdivision of land “unless the subdivision has received prior approval under municipal or county planning codes” under the MPC.³⁷ The EQB deleted this provision and adopted a regulation duplicating the statutory language prohibiting denials for inconsistency with land use regulations.³⁸

Problem: Lack of coordination with land use planning affects state funding and approval decisions.

The Acts 67/68 amendments to the MPC grant Commonwealth agencies the authority to “rely upon” comprehensive plans and zoning ordinances when reviewing applications for funding or permitting of infrastructure or facilities – *if* the municipality’s comprehensive plan is generally consistent with a county comprehensive plan, if there is a joint municipal zoning ordinance, or if a cooperative multi-municipal plan is being implemented.³⁹ While these provisions provide modest incentives for consistency within comprehensive planning, they do not provide incentives to strengthen links between official sewage facilities plans and land use decisions.

The DEP, in its Land Use Policy implementing Acts 67/68, excludes decisions under Act 537 from review for consistency, stating that the Sewage Facilities Act “already

includes a mechanism to address land use.”⁴⁰ While this is true, the limitations of that mechanism in providing a basis to deny approval are substantial. Likewise, the DEP’s companion policy governing consistency review of financial assistance does not apply to cost-shares for update revisions to sewage facilities plans.⁴¹

The Pennsylvania Infrastructure Investment Authority (PENNVEST) provides funding for sewage, water, and stormwater infrastructure using federal revolving loan fund monies and state monies including bond proceeds. PENNVEST, by policy, uses consistency of proposed projects with comprehensive plans in determining eligibility.⁴² The PENNVEST statute and regulations, however, do not require such consistency.⁴³ Moreover, the PENNVEST policy, while reinforcing consistency, does not require the comprehensive plan to identify specific development areas where municipal infrastructure will and will not be provided.

New state water and sewer bond funding approved in 2004 provides only limited consistency requirements. The legislature required that applications for grants and loans for water supply or wastewater infrastructure projects approved by the Commonwealth Financing Authority to support economic development must be “generally consistent with any applicable county or local comprehensive plans.”⁴⁴ It also provided that the Authority Board must give priority consideration to projects “which are integral for development or redevelopment of sites which are planned for development.”⁴⁵ These requirements fall short of a full consistency requirement, but provide slightly more than either the MPC or Act 537.

The recently announced Keystone Principles for Growth, Investment, and Resource Coordination, provide some guidance to state agencies in making discretionary investments, favoring redevelopment, efficient infrastructure,

concentrated development, jobs, and regional planning.⁴⁶ But these principles do not address private or municipal investment.

Solution: Legislators and state officials should improve municipalities' ability to make sewage facilities plans consistent with sound comprehensive land use plans.

Pennsylvania's legal framework for sewage management should promote efficiency in capital and operating expenditures and consistency with land use planning objectives, as well as efficiency in the use of water resources, and protection of public health and watershed health. The legislature has not taken on this issue primarily because each revision of a sewage facilities plan and each municipal land use approval has been seen in isolation, rather than understood as an integral part of Pennsylvania's economic posture.

Infrastructure planning decisions can either sustain efficient growth or support fiscally expensive sprawl development and urban abandonment. With appropriate regulatory and statutory amendments and changes in implementation, sewage facilities planning and comprehensive land use planning can carry out a consistent vision of growth and conservation. A number of straightforward solutions are available.

Pennsylvania could amend the MPC.

1. Amend section 301 to provide that official sewage facilities plans under Act 537 must be "consistent" with comprehensive land use plans.
2. Amend section 301(a)(4) to require that the planning element for "community facilities and utilities" in each comprehensive plan *must* provide for sewage facilities (rather than "may include...sewerage facilities and waste treatment").⁴⁷ The Pennsylvania State Association of Township Supervisors

(PSATS) has recently endorsed "concurrency", which "requires development to occur only when and where infrastructure is in place to accommodate it."⁴⁸

3. Amend section 301(d) of the MPC to provide that comprehensive plans must identify those areas where development will occur and where it will not occur so that sewer and other public infrastructure services can be adequately planned and provided.⁴⁹ Comprehensive plans should be required to identify municipal service areas in order to guide the provision of sewage treatment and other infrastructure proactively based on data, rather than to let sewer services simply follow development applications.

Pennsylvania could amend the Sewage Facilities Act and regulations.

1. Amend section 5 of the Sewage Facilities Act to expressly require sewage facilities plans to be consistent with municipal comprehensive plans and zoning and subdivision ordinances, and in municipalities without planning and zoning to be consistent with county comprehensive plans.
2. Amend section 5(b.2) to require DEP to defer to municipal comprehensive plans and land use ordinances when considering a request for private revision of the sewage facilities plan, and to deny a private revision if the municipality has done so on the grounds of inconsistency.
3. Amend the regulations to provide that a municipality "may not adopt a proposed revision to an official plan, conditional or otherwise, until it determines that the proposal complies with municipal zoning, land use or other municipal comprehensive plans."

Pennsylvania could adopt financial requirements that support consistency.

1. Adopt policies to deny funding under PENNVEST, the Commonwealth Financing Authority, Community Development or other grants and loans for sewage facilities unless they demonstrate consistency with municipal and county comprehensive land use plans that *specifically identify* development areas where public infrastructure will and will not be provided.⁵⁰ Such a policy would reward sound planning coordination, not just the absence of inconsistency, as under current land use review policies.
2. Adopt legislation specifying where state funding will and will not be provided. For example, Maryland’s priority funding area legislation (sometimes called “smart growth” legislation) makes state infrastructure funding available only in priority development areas, defined as the state’s existing urbanized areas plus local-government designated growth areas.⁵¹ This approach has led to efficient revitalization of urban areas and sound and proactive planning in suburbanizing and rural areas.

Pennsylvania could use existing authority to improve consistency of sewage facilities planning with sound land use.

1. DEP could use its authority to require updates of sewage facilities plans whenever population or dwelling unit increases exceed a specific threshold, in order to assure that official plans do not lag far behind development pressures and become disconnected with land use plans. The Act allows DEP to require such updates “from time to time...as may be required by rules and regulations adopted hereunder or by order of the department.”⁵² Sewage facilities planning,

like comprehensive planning, should be forward-looking, not just reactive.

2. DEP could establish a policy to require joint updates of sewage facilities plans whenever new land development is occurring in jurisdictions adjacent to those with existing capacity.⁵³ Inter-municipal cooperation on sewage infrastructure provides for resource efficiency and facilitates development-related planning.⁵⁴
3. DEP and the Department of Community and Economic Development could promote multi-municipal planning under Acts 67/68 that includes water resources and joint 537 sewage facilities planning.

Notes

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2. 35 P.S. § 750.1 et seq.
3. 53 Pa. Stat. Ann. §§ 10101-11202.
4. Report of the Pennsylvania 21st Century Environment Commission, Sept. 1998, p. 51, available at <http://www.21stcentury.state.pa.us/2001/final.htm>
5. Brookings Institution, *Back to Prosperity – A Competitive Agenda for Renewing Pennsylvania* (2004).
6. Allegheny Conference on Community Development, *Investing in Clean Water: A Report from the Southwestern Pennsylvania Water and Sewer Infrastructure Project Steering Committee* (2002).
7. PA Prosperity Coalition, *Forward to Prosperity – Removing Obstacles to Pennsylvania’s Economic Performance* (2005).
8. 10,000 Friends of Pennsylvania, *Sewage Facilities and Land Development: An Analysis of Sewage Facilities Planning and Permitting in Relation to*

Land Use Planning and Development in Southeastern Pennsylvania (2005).

9. Environmental Law Institute, *Plumbing the Future: Sewage Infrastructure and Sustainability in Western Pennsylvania* (1999).

10. Taxpayers for Common Sense, *Banking on the Future: Investing in Smart Water Strategies for Pennsylvania and the Nation* (2005).

11. National Research Council, *Regional Cooperation for Water Quality Improvement in Southwestern Pennsylvania* (2005).

12. While the Pennsylvania Supreme Court has disfavored very large lot zoning (over two acres) as potentially exclusionary and hence subject to additional scrutiny (e.g. *Concord Twp. Appeal*, 268 A. 2d 765 (1970)), one-acre lots are very common in Pennsylvania. Many of these use on-lot sewage disposal, as the expense of running sewers to serve such large lots can be substantial.

13. PA Prosperity Coalition, *Forward to Prosperity – Removing Obstacles to Pennsylvania’s Economic Performance* (2005), at p. 8.

14. The Pennsylvania State Association of Township Supervisors (PSATS) found that “with all but a few exceptions, developers in Pennsylvania can build wherever they want” thus leading to a mismatch of development and infrastructure. PSATS, A Position Statement: Sound Land Use & Growth Management, available at <http://www.psats.org/landuse.pdf>

15. Indeed, the municipality makes no revision to the official plan if the subdivision is ten lots or less and served by on-lot systems. 25 Pa. Admin. Code § 71.55. Also subdivisions of one acre or larger proposing the use of on-lot systems are exempt if they are not in areas conducive to nitrate pollution of groundwater, nor in High Quality or Exceptional Value watersheds, provided that soil testing shows the availability of on-lot and replacement absorption sites on each parcel. 25 Pa. Admin. Code § 71.51.

16. U.S. Census, 2000 & 1990, and National Resource Inventory 1997- rev.2000 (annualized rate).

17. 10,000 Friends of Pennsylvania, *Sewage Facilities and Land Development: An Analysis of Sewage Facilities Planning and Permitting in Relation to Land Use Planning and Development in Southeastern Pennsylvania* (2005).

18. 53 Pa. Stat. Ann. §§ 10301(a)(4).

19. 53 Pa. Stat. Ann. §§ 10301(d).

20. 53 Pa. Stat. Ann. § 10608.1.

21. 53 Pa. Stat. Ann. § 11103(a)(3).

22. 53 Pa. Stat. Ann. § 11106(a)(1).

23. 35 P.S. § 750.5(d)(4).

24. 35 P.S. § 750.5(d)(8).

25. *Oley Township v. Department of Environmental Protection*, 1996 EHB 1359 (1996), *affd.* 710 A.2d. 1228 (Pa. Commw. 1998). But *Oley* did not hold that land use issues are irrelevant, only that they are unreviewable in the context of litigation over the sewage facilities plan. *Compare Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Commw. 1975) (“it is not a proper function of the DER to second-guess the propriety of decisions properly made by individual local agencies in the areas of planning, zoning...”)

26. 25 Pa. Admin. Code §§ 71.21(a)(3).

27. 25 Pa. Admin. Code §§ 71.21(a)(5)(i)(D).

28. 25 Pa. Admin. Code § 71.31(e). The DEP’s role is limited to considering whether the plan documents the resolution of identified inconsistencies under this provision. 25 Pa. Admin. Code § 71.32(d)(6).

29. 25 Pa. Admin. Code § 71.31(b).

30. Penna. Dept. of Environmental Protection, “Sewage Facilities Planning: A Guide for Preparing Act 537 Update Revisions,” DEP ID 362-0300-003 (Feb. 4, 1998, revised through Jan. 7, 2003), at p. 16.

31. 25 Pa. Admin. Code § 71.52(a)((3)(iv).

32. 25 Pa. Admin. Code § 71.53(f)(3). It is up to the municipality to consider consistency, not DEP. 25 Pa. Admin. Code § 71.53(e). But the plan revision must contain the information about the municipality’s consideration of consistency. 25 Pa. Admin. Code § 71.54(b).

33. 27 Pa. Bull. 5877 (1997).

34. 35 P.S. § 750.5(b).

35. 35 P.S. § 750.5(b.1).

36. 35 P.S. § 750.5(b.2).

37. 25 Pa. Admin. Code § 71.14(c)(1997)

38. 27 Pa. Bull. 5877 (1997), 25 Pa. Admin. Code § 71.14(e)(3).

39. 53 Pa. Stat. Ann. §§ 10619.2(a),(c), 11105(a)(2).

40. Penna. Dep't. Of Environmental Protection, "Final Revision of Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Permits for Facilities and Infrastructure," DEP ID No. 012-0200-001 (March 6, 2004), p. 4. The Policy continues the exclusion "at this time" but removes the conclusion in the prior version of the Policy that the Sewage Facilities Act "already meets the intent of Acts 67 & 68." DEP ID No. 012-0200-001 (June 8, 2002), p. 4.

41. Penna. Dep't. Of Environmental Protection, "Policy for Consideration of Comprehensive Plans and Zoning Ordinances in DEP Review of Grants and Funding for Facilities and Infrastructure," DEP ID No. 012-0200-002 (August 28, 2004), pp. 4-5.

42. "We have established an eligibility requirement for PENNVEST funding that proposed projects be consistent with applicable municipal, multi-municipal or county comprehensive land use plans and zoning ordinances." PENNVEST's Land Use Policy Initiatives (2001), available at <http://www.pennvest.state.pa.us/pennvest/cwp/view.asp?A=11&Q=83163>.

43. 35 P.S. 751.10 and 25 Pa. Admin. Code §963.5 do not list consistency with MPC comprehensive plans as a criterion.

44. 64 Pa. C.S. Ann. §§ 1558(c)(1)(iv), (d)(1)(v).

45. 64 Pa. C.S. Ann. §§ 1558(c)(2)(iv), (d)(2)(iii).

46. Keystone Principles for Growth, Investment, and Resource Conservation (Oct. 24, 2005), avail. at <http://www.dep.state.pa.us/newsreleases/default.asp>.

47. 53 Pa. Stat. Ann. § 10301(a)(4).

48. PSATS, A Position Statement: Sound Land Use & Growth Management, available at <http://www.psats.org/landuse.pdf>

49. Compare 53 Pa. Stat. Ann. § 10301(d) (comprehensive plan "may identify" areas where

growth and development will occur in order to plan for public infrastructure including water and sewer).

50. While current PENNVEST policies call for review of consistency with existing comprehensive plans, it may be possible to condition funding eligibility under this and other programs upon the existence of, and consistency with, a more detailed element of comprehensive planning that specifies infrastructure service areas. See, e.g., 53 Pa. Stat. Ann. § 10301(d).

51. Md. Code Ann. State Fin. & Pro. § 5-7B-01.

52. 35 P.S. § 750.5(a).

53. 25 Pa. Admin. Code § 71.13(c). DEP used this authority to compel Edinboro Borough and Washington Township in Erie County to plan together, in an order upheld by the Environmental Hearing Board in 2003, and enforced by Commonwealth Court in 2004.

54. The Sewage Facilities Act specifically has a purpose "to promote intermunicipal cooperation in the implementation of [sewage facility] plans by local government." 35 P.S. § 750.3(2).

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