Restricting Development to What Is Approved in a Subdivision and Land Development Plan

When a local government is approving a subdivision and land development plan, a landowner or developer sometimes agrees to place restrictions on the land to ensure that no further subdivision or development of common open space or large lots can occur beyond that contemplated in the plan being approved. Pathways to establishing these restrictions in Pennsylvania so that they are successful in the long run are described in this guide.

Protecting Open Space in New Development

To retain some open space as land is developed, local government may include an open space requirement in the subdivision and land development and zoning ordinances that shape development in the municipality. However, a local government that wants to *ensure* that common open space designated in new subdivisions remains open space in the long run must be careful to create legally enforceable open space protections when approving developments under these ordinances:

- It could seek an arrangement with the owner/developer to have the open space dedicated to the municipality with the municipality then responsible for caring for the land in perpetuity. (Oftentimes, this solution is neither acceptable to the developer nor the municipality.)
- The owner/developer could grant a conservation easement over the open space to the municipality or a land trust that is partnering with the municipality. Land ownership would remain with the developer or future homeowners' association, but uses and improvements on the land inconsistent with its common open space purpose would be blocked. The conservation easement provides strong, long-run protection for open space. (Few land trusts are willing to accept conservation easements associated with subdivisions unless the open space is extraordinary in its delivery of conservation benefits to the broad public, and the long-term costs associated with the easement are covered by an upfront payment into the land trust's stewardship fund.)
- Whether the land to remain undeveloped is owned by one lot owner or by a homeowners' association, restrictions could be placed in documents to be recorded at the county recorder of deeds to ensure the planned development restrictions are enforceable in the future. The restrictions on future development might be included in the deeds of conveyance for the lots; on subdivision and land developments plans with restrictions notated; and in declarations of covenants, conditions, and restrictions that guarantee the land remains open forever and specifies exactly who can enforce the restrictions. Once recorded in the County Office of the Recorder of Deeds, these restrictions become covenants running with the land—that is, they are binding on future owners.

This last mechanism—the use of *restrictive covenant agreements*—is the focus of this guide. With the landowner's or developer's consent, this mechanism can also be used to prevent large lots in a subdivision from being further subdivided, ensuring that they will continue to provide open space benefits to the broader community while remaining privately owned. (The restrictive covenant agreement can be coupled with a conservation easement to further ensure the permanence of the open space.)

Background on Restrictions in Subdivisions

Deed restrictions can be used to limit allowable uses and construction on a property. From a land use control perspective, they are ancient tools, preceding both municipal zoning regulations (first established in the early 20th century) and conservation easements (first used in Pennsylvania in the 1960s). Prior to widespread zoning, developers often imposed private deed restrictions on all lots within a new subdivision.

Courts have long distinguished between "use restrictions" and "building restrictions," both of which are found within deed restrictions. Historically, residential subdivisions often contained restrictions against future use of the properties for what were then considered incompatible and undesirable land uses, like tallow or candle making, tanneries, abattoirs, breweries, taverns, etc. Building restrictions, in contrast, deal with sizes and locations of buildings which may be developed on a parcel of land; they also can restrict the type of building—i.e., single family residence—that can be constructed. Such restrictions have also been used to establish minimum square footage for a dwelling unit and limit the height of buildings and signs. In communities developed under the Uniform Planned Community Act, 68 Pa. C.S. §5101 et seq., or the Uniform Condominium Act, 68 Pa.C.S.§3101 et seq., restrictions on activities, maintenance, and even exterior finishes and colors preserve a certain amount of uniformity throughout the development thought desirable for property values.

Title searches for properties in some developments from the early 1900s turn up restrictions that include noxious terms prohibiting sales of property to "Negroes," "Jews," and others deemed undesirable by restriction drafters. The 1948 Supreme Court decision in *Shelley v. Kramer, 334 U.S,1, 68 S.Ct. 836* (1948), prohibited states from enforcing race-based restrictions, and in 1968 the U.S. Congress passed the Fair Housing Act, which banned restrictions discriminating on the basis of race, color, religion, or national origin.

Deed restrictions can be found in deeds to real property, or in agreements separately recorded against the property, like a condominium association declaration of covenants, an easement agreement, or a stormwater management agreement.

Restrictions Established As Part of Plan Approval

Local land use ordinances might require a certain amount of open space or recreational land be retained during subdivision and land development, or a landowner or developer might agree to a restriction against further subdivision and development in order to get approval for a particular development on the land. In these cases, it makes sense to place such restrictions in a deed or restrictive covenant agreement that explicitly spells out the permissible uses of the land and the prohibitions against subdivision or other uses and is recorded in the county recorder of deeds office as a permanent public record of the restrictions. Recording the deed restriction makes it a covenant running with the land and binding on future owners of the land. These provisions can be separate recordable instruments or embodied in a deed of conveyance (particularly where the grantor of the deed retains ownership of a portion of the parent tract).

The restrictions can be (and, when required by the local government, often are) implemented by way of recorded, approved, subdivision and land development plans, which might have a plan note that spells out the restriction, like "Lot 1 will not be further subdivided." Municipalities must approve what are called *Record Plans* before they are recorded at the County Recorder's office by having the planning commission and the governing body (e.g., the board of supervisors or borough council) sign them before

they can be recorded (and before building permits can be issued). Thus, the municipality is in the position to check to make sure the restriction appears on the Record Plan destined for the courthouse as a permanent, public record.

Many residential subdivisions are restricted against further development on the recorded subdivision plan, but a separate, recorded agreement might be more effective. After the development has been built and occupied, neither the municipality, nor the subsequent owners, may have occasion to review the plans or the notes and new, later owners, might not even be aware they exist. Local elected officials and zoning officers can and do change and with such change comes loss of institutional memory. Recording a restrictive covenant agreement or including the restriction in a deed against all affected properties has a better chance of being known to subsequent purchasers who will see it in their deed when they purchase a lot in the development or in the title report.

This concern does not apply to *planned communities* built under the Pennsylvania Uniform Planned Community Act, 68 Pa. C.S.A. §3301 et seq. or the Pennsylvania Uniform Planned Community Act, 68 Pa. C.S.§5101 et seq. where there is a condominium or homeowners association and a declaration which spells out the rules and regulations and provides for the care of "common elements" and "common land." The laws require that all new owners be given a copy of the declaration. The declaration also customarily includes restrictive covenants on the use of individual lots including the keeping of pets, restrictions against above-ground swimming pools, and the like.

Challenges to Effectiveness

In addition to the risk that no-one will notice that a restriction noted in a subdivision plan has been violated, the effectiveness of restrictions established by restrictive covenant agreements have at least three other major vulnerabilities:

- Courts favor the least restrictive interpretation when there are ambiguities in restrictive covenant agreements.
- There are limits on who may enforce a restriction.
- Those empowered to enforce the restriction may lack interest in doing so.

Least Restrictive Interpretation

If there is any ambiguity as to the interpretation the restrictive covenant agreement, a court will always favor the interpretation least restrictive to use of the property. As the Pennsylvania Commonwealth Court explained in Doylestown Township v. Teeling, 160 Pa. Commw. 397 *; 635 A.2d 657 **; 1993 Pa. Commw. LEXIS 740 ***:

> A restrictive covenant is a restriction in an instrument relating to real estate by which the parties pledge that something will not be done. Restrictive covenants have limited the use of property, have restricted access to certain roads, and have imposed limits on re-subdivision. Such covenants are said to run with the land, when not only the original parties or their representatives, but each successive owner of the land, will be entitled to its benefit, or be liable, as the case may be, to its obligation. Although restrictive covenants are not favored by the law and are strictly construed against those seeking to enforce them, they are legally enforceable.

For example, courts have held that a restrictive covenant limiting the construction of buildings to being residences does not preclude the future conversion of such buildings for non-residential use. (See, e.g., *Kauffman v. Dishler*, 380 Pa. 63, 110 A.2d 389 (1955).) In other words, if there is ambiguity in interpreting the restriction, courts will favor the interpretation that allows the use or construction on the land.

Limits on Who Can Enforce

A question often arises as to who has the right to challenge a breach of the covenant. In legal terms, who has *standing* to bring an action in court to stop a violation? Who was the restriction intended to benefit—future owners of the land? Their neighbors? Anybody at all? As one county court explained:

> In sum, Pennsylvania courts allow third party beneficiaries standing to enforce restrictive covenants in

two instances: (1) where plaintiffs are clearly identified as the third party beneficiaries of the restriction; and (2) where plaintiffs are given rights to enforce the restriction through a planned subdivision with a shared restrictive covenant. Fey, 454 A.2d at 554, Mariner, 92 A.2d at 220-221; Gey v. Beck, 390 Pa. Super. 317, 568 A.2d 672, 676 (Pa. Super. 1990)

In the case quoted, *N. Chestnut Hill neighbors Inc v. Chestnut Hill College, Inc.,* (2013 Phila. Ct. Com. Pl. LEXIS 76 *; 29 Pa. D. & C.5th 179 **) a group of neighbors challenged the development of land subject to three different restrictions, but the court found in order to have standing to enforce the deed restrictions, neighbors and civic groups must show that they qualify as third-party beneficiaries of the restrictive covenants to be allowed to sue to enforce the restrictions. The court then found that none of those who brought the lawsuit were identified as intended beneficiaries, either by name or due to their proximity to the land in question in the written and recorded restrictions. The court commented, "Simply put, there is no clear indication that Appellants were intended as third-party beneficiaries to the deed restrictions."

Disinterest in Enforcing

In the Chestnut Hill case, one of the deed restrictions was from a state Growing Greener grant used to purchase some of the land and was, by its very terms, enforceable by the Pennsylvania Department of Conservation and Natural Resources, which did not bring an action.

Even if a municipality has a right to enforce the restriction or sue to correct a breach, it is not guaranteed that those who have the power to enforce a restriction contained in a note on a plan or even in a deed restriction will do it. The courts have suggested that such restrictions must be enforced in a separate action in court, not by turning down a subdivision or land development plan, *unless the relevant zoning code contains an explicit provision allowing it*. Sometimes the elected officials in charge when the restriction is violated differ from those in charge when the restriction was created to the point that they do not want to spend the taxpayer revenue to enforce the restriction.

These difficulties in enforcing restrictive covenant agreements point to the importance of constructing restrictions that explicitly name multiple parties as having the right to enforce them, in other words, naming them as *third-party beneficiaries* of the restrictions.

More Guidance from the Courts

In recent years, Commonwealth Court has dealt with several cases that reinforce that restrictions against further subdivision as a condition of subdivision approval can be effective but care must be taken in establishing them.

Restrictive Covenants Are Enforceable

The 1993 decision *Doylestown Township v. Teeling*, 635 A.2d 657 (Pa. Cmwlth. 1993) was quoted in the previous section.

Mr. Teeling had purchased a 10+ acre parcel of land which had been previously approved as part of a five-lot subdivision, with all four of the large lots (over 10 acres each) being restricted against further subdivision. The subdivider had requested substantial waivers from requirements under the subdivision and land development ordinance, citing the fact that these were large lots and that he was willing to restrict them against further subdivision. The plan was, of course, recorded with the restrictions set forth on the plan, and stating that the lots "will be deed restricted to prohibit any further subdivision." In fact, the deeds of conveyance each referred to the notes on the recorded subdivision plan but did not specifically repeat the wording of the restriction. Nevertheless, Commonwealth Court concluded that the restriction was enforceable by both (1) the township, since the subdivider had agreed to the note restricting against further subdivision as set forth on the plans, and (2) by owners of the other lots in the subdivision subjected to the same restriction.

Commonwealth Court also noted that Mr. Teeling had received specific notice, as set forth in his title insurance policy, that the property was restricted against further subdivision. Thus, Mr. Teeling had actual notice via his title insurance policy and constructive notice via the

recordation of the subdivision plan of the restrictive covenant. Nevertheless, he sought to break the restriction, arguing that it was void because it was against public policy and unenforceable.

In its decision, Commonwealth Court provided strong support for the use of restrictive covenants, at least in this context where they are imposed in conjunction with approval of a subdivision plan, concluding that they were enforceable either by the township itself or by owners of other lots within the subdivision. Quoting from the Commonwealth Court's Opinion:

> Because the subdivider agreed to the notation restricting further subdivision, that restriction, which runs with the land, is binding upon all subsequent purchasers.
>
> A municipality may sue in equity to enjoin violation of a condition attached to a subdivision approval.
>
> A second basis for our decision is that [the other lot owners] as property owners in the subdivision, may enforce the condition.
>
> Although restrictive covenants are not favored by the law and are strictly construed against those seeking to enforce them, they are legally enforceable.
>
> Although the covenant was not specifically incorporated in his deed, Teeling had notice of the restriction through both the recorded subdivision plan and the title insurance report." 635 A.2d 660-661.

Notice to the World Is Crucial

Approximately 10 years later, Commonwealth Court dealt with restrictive covenants imposed on approval of subdivision plans in two additional cases, *Wolter v. Tredyffrin Township*, 828 A.2d 1160 (2003) and *Walsh v. East Pikeland Township*, 829 A.2d 1219 (Pa. Cmwlth. 2003).

In both the *Wolter* and *Walsh* cases, the municipalities sought to prevent further subdivision of large lots which had been created under prior subdivision approvals of a "lot averaging" subdivision plan. In other words, large lots were "averaged" against smaller lots to meet the prevailing density requirement for the prior subdivision, although no "common open space" was created. In both instances, however, the restriction against further subdivision was not placed on the recorded subdivision plan and was memorialized only in the terms of approval of the prior subdivisions, documents that are not recordable. Thus, both *Wolter* and *Walsh* were considered to be innocent third-party purchasers, unlike Mr. Teeling, who had purchased his property knowing full well that it was restricted against further subdivision.

The *Wolter* and *Walsh* cases point out that municipalities must diligently attend to detail when restricting large lots or common open space areas against further subdivision. Better to document the restrictive covenants twice—once on the recorded plan and later in a recorded declaration of covenants, conditions, and restrictions—than to overlook the mandatory process of giving notice to the world of restrictive covenants by recording the covenants at the Recorder of Deeds Office.

Measures to Increase the Success of Restrictions

Restrictions are often negotiated during the land development or subdivision approval process between the municipality and the developer, and the terms of the restrictive covenant, or note on the plans, are written during the approval process. By using conservation easements to restrict use of land instead of or as a supplement to restrictive covenant agreements and plan notes, you can avoid crucial weaknesses in these approaches, namely the courts favoring least restrictive interpretations and possibly not having a party to enforce the restrictions. But again, the conservation easement is not always an available option. Regardless, municipal governments can better ensure the effectiveness of restrictions by following certain practices.

- Pay careful attention to exactly how the restrictive covenant agreement or note on the subdivision plan is written—be sure that they are crystal clear and understandable. Remember that—presented with

any ambiguity—the courts will favor the interpretation least restrictive of use of the land.

- Draft the restrictive covenants explicitly to the benefit of one or more neighboring properties, along with the local government. This gives the owners of these neighboring properties the right to enforce the restrictions against owners of the restricted land.
- Draft the restrictive covenants to be of sufficient benefit to the neighbors that they will actually be motivated to enforce the restrictions when they are put to the test.
- Consider drafting the restrictive covenants to name a civic organization or a larger set of properties within a certain radius as third-party beneficiaries with an explicit right to enforce the restriction.

In the context of new planned community residential subdivisions containing common open space, enforceability is less of a problem, particularly where the declaration grants specific enforcement rights to (1) the property owners, (2) the community association, AND (3) the municipality. Most municipalities, in their solicitor's review of such declarations, now require that the municipality be granted such enforcement rights. However, some municipal solicitors insist that *only* the municipality have enforcement rights; as previously discussed, such a limit on who may bring a lawsuit to enforce a subdivision or development restriction risks the restriction not being enforced at all.

Opportunity

Citizens interested in land development or subdivision proposals must realize that the best time to achieve restrictions protective of open space, especially protections going beyond those called for by the municipal land use ordinances, is during the development approval process, so that the restrictive covenant becomes a condition of any approval. The best opportunity to optimize open space protection arises when the development plans need *waivers* from strict compliance with subdivision regulations or other accommodations from the zoning ordinance and the owner/developer is willing to offer the restrictive covenants against further subdivision to a municipality who is willing to approve the plans with restrictions against further subdivision as a condition of approval.

Fortunately, the subdivision and land development process is required to be a public one in Pennsylvania, so that interested citizens can attend zoning board hearings, planning commission meetings and local governing body meetings and participate. The state's Right to Know law and Sunshine law give citizens the right to see documents and to give input at local government meetings where important subdivision and development decisions are made.

The latest version of this guide and related resources are posted at WeConservePA.org.

WeConservePA produced this guide with support from the Colcom Foundation, the William Penn Foundation, and the Community Conservation Partnerships Program, Environmental Stewardship Fund, under the administration of the Pennsylvania Department of Conservation and Natural Resources, Bureau of Recreation and Conservation.

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v. 8/7/2021