

Top Eight Takeaways

Marshall Land Use and Development Forum

February 25, 2021

Panelists: Ann Hutchinson, Natural Lands Trust
Roy Kraynyk, Allegheny Land Trust
Susan J. Smith, Law Office of Susan J. Smith

In no particular order:

1. The Township cannot officially “close its doors” to development or growth.

Marshall Township’s remarkable growth during the previous decade has not been free of growing pains, including increased traffic volume and the perception that the continued consumption of undeveloped land will alter the rural character of the Township’s western side. This begs the question: What is the carrying capacity of Marshall Township, in terms of public infrastructure, facilities and services? Does there come a point at which the Township can determine that it has reached its limit and cannot support further expansion, lest it be caught in a cycle of investing in infrastructure upgrades that spur additional land development?

Susan clarified that “technically, a community should never articulate that it’s closing its doors to development or growth; that’s a line courts have clearly drawn.” In setting zoning standards to lawfully accommodate growth over time – for example, in considering amendments for Marshall’s Conservation Residential district – a community needs to have done the homework in advance to justify decisions, such as analyzing the facts and figures on growth rate, land use, internal and external growth generators.

2. Marshall Township’s approach to conservation subdivision zoning is generally consistent with best practices across the state, though the Township could review and adjust the requirements to ensure that they effectively implement local land use policy.

In its 2008 zoning ordinance, the Township created a Conservation Residential (CR) district to accommodate housing development in the form of conservation subdivisions. Conservation subdivisions are *density neutral* compared to traditional subdivisions, meaning that the same number of lots and homes would exist either way. The key difference is that homes and infrastructure in a conservation

subdivision are arranged in a cluster to minimize the footprint of development and permanently preserve environmental features.

To determine the buildable lot area of a site in the Township's CR zoning district, the Township requires the "net out," or subtraction, of certain environmentally constrained land, such as steep slopes, flood plain or wetlands. The resulting "adjusted tract area" is used to determine how many homes may be built on the site. For instance, a developer who has a flat 10-acre site will base the number of homes on 10 acres, while a developer whose site includes three acres of steep slopes will base the number on seven acres.

Ann verified that this approach is an effective conservation practice supported by law, particularly the court case *Reimer vs. Upper Mt. Bethel*. Based on a cursory review of the Township's CR district, she found the regulatory approach to be generally consistent with best practices she has seen in her work with more than 140 townships across Pennsylvania.

This is not to say that adjustments aren't worth considering: The Township could look into reducing the base density or otherwise reviewing its requirement calculations. Ann would not recommend a "ring around the collar" approach of requiring new developments to include a large perimeter setback, as this would compromise higher priorities for resource preservation. The Township's CR district already requires all homes to be set back 100' from external roads, 50' from all other tract boundaries, 100' from cropland and 150' from any active recreation areas. The Township could consider requiring more intense buffer screening along major roads if reducing the visibility of development is a priority.

Susan agreed that net-outs have been established as a defensible strategy in Pennsylvania as long as a community articulates reasons for carving out environmentally sensitive lands and does not apply excessive limits. For example, an excessive limit could be requiring that all 5% slopes are subtracted from the buildable lot area.

3. Zoning is the first line of defense in preserving open space, but it is only one tool of many that could help the Township in this regard.

The communities that have most successfully created permanent protection for open space have "more than one arrow in their quiver," as Ann said. Panelists described the following tools:

- **Conservation easements or deed restrictions** – Voluntary legal agreements between a landowner and a land trust or government agency in which land continues to be privately owned but its uses are permanently limited for conservation purposes

- **Fee simple acquisition** – A land trust or government agency acquires land with conservation value via donation, sale or a fundraising campaign. Susan noted that there’s nothing to stop a municipality from investing local revenues in acquiring property with conservation value. Roy noted that potential revenue sources that Marshall could apply to conservation projects include real estate transfer fees or Regional Asset District allocation.
- **Conservation referendum** – Residents may vote to establish a tax specifically dedicated to open space protection in their municipality or approve municipal borrowing for conservation projects. Roy noted that 86% of PA DCNR grants in any given year go to the eastern side of the state, where townships and counties have passed bond referendums generating revenue that they use to match DCNR grants. In 2019 and 2020, six Eastern PA townships passed referendums for bonds totaling \$42.4 million for land protection. Closer to home, the Pittsburgh Parks Conservancy was successful in passing a referendum to increase city taxes by 1 mill to generate \$10 million annually for conservancy to improve city parks. Put up for a vote, Roy said, such referendums tend to pass.

Roy described some of Allegheny Land Trust’s 25 projects in Northwest Allegheny County that have preserved 857 acres with an appraised value of over \$14 million over 20 years. He noted that the level of participation by municipalities varied widely, in terms of fundraising/financial support, public works assistance with on-the-ground work and involvement in acquisition. Some parcels were 100 percent donated; in other cases, owners agreed to bargain sell a property at 50 percent of value.

Most notably, Roy pointed out that a donation of land value can be leveraged to win grants from PA DCNR. Allegheny Land Trust has in some cases more than doubled the money on local projects, depending on timing and whether a project resonates with funders. Resources are out there.

4. The Big Sewickley Creek Watershed study includes insights and recommendations that Marshall Township should consider incorporating into its comprehensive plan.

The new Rivers Conservation and Stewardship Plan for the watershed, prepared by Allegheny Land Trust, identified:

- Species of special concern in the creek that deserve protection
- Conceptual greenway ideas that the Township can examine and refine, which represents a solid start for a greenway plan that would ultimately connect with other municipalities
- Recommendations for maintaining water quality and reducing flood events

- Findings from stakeholder interviews, such as the revelation that downstream communities (Ambridge, Leetsdale, Leet) experience flash floods when it's not raining due to rain somewhere upstream (Bell Acres, Franklin Park, Marshall)

Roy emphasized the value of strategic land conservation in absorbing precipitation. On average, one acre of woodlands can absorb about 800,000 gallons of water per year, based on 40 inches of rainfall. Protected woodlands in strategic areas can intercept runoff from non-point sources. The report has recommendations for this and other issues that can add value to the Township's new comprehensive plan.

5. Extending sewer infrastructure intensifies development pressure.

As Susan explained, certain conditions in a community drive interest in land development: Roads, public water, public sewer. Extension of a public sewer line requires revenue to support the line and the maintenance of associated facilities and infrastructure. This often depends on additional customers who will use that line and pay tap-in and user fees.

In Pennsylvania, lot size in rural areas is often related to ensuring that land capacity is available for the installation of on-lot septic systems. In areas served by public sewer that have no need for on-lot system, the question becomes: What justification remains for large lot sizes?

Ann added that Pennsylvania courts have not supported arbitrarily large minimum lot sizes in areas with public sewer. So, she said, the best we can do is to establish a reasonable underlying density and then subtract out constrained land.

6. Drastically downzoning the Township's western side represents a considerable legal risk.

Were Marshall Township to decide to rezone the western portion to require, say, a minimum lot size of 10 acres per house, the first challenge is one that will be the subject of litigation: Where did you get that number? What supports the number? Is it reasonable?

Courts, Susan explained, are not comfortable with large-lot zoning that involves numbers without justification. In the eyes of the law, there is always tension in balancing an owner's right to develop private property as he or she wishes with the public interest in setting limits.

In the case of the 10-acre-lot rezoning, courts would require justification for the burden the minimum would represent for affected property owners. Susan advises

following the path of: Is the number reasonable and not excessive? Do I have reasons to support the selection of that number? The larger the minimum lot size in question, the more trouble it may be to satisfy the courts on a challenge to that ordinance. Generally across Pennsylvania, any lot size minimum above two acres starts to get into the territory of potential challenge as an undue restriction.

In the case of considering downzoning to reduce the density in areas of, say, a community prone to landslides, Susan explained that carving out environmentally sensitive areas from buildable area calculations is easier to defend than increasing a district's minimum lot size for environmental protection purposes.

7. Variances are less of a judgment call than you may think.

A variance from the zoning ordinance is a mechanism by which someone can seek relief from one of its requirements. A comparable relief mechanism for a Subdivision and Land Development Ordinance (SALDO) is a modification (partial relief) or waiver granted by elected officials. Such relief is governed by very specific standards articulated in the Pennsylvania Municipalities Planning Code and by courts.

The only body that can issue a variance in Pennsylvania is the Zoning Hearing Board, and as Susan explained, the ZHB issues variances not by discretion, but by the application of standards.

In order to obtain a variance, an applicant must demonstrate **all five** of the following requirements to the ZHB:

- That there are unique physical circumstances or conditions peculiar to the particular property which create an unnecessary hardship
- That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the zoning ordinance, and that the authorization of a variance is therefore necessary to enable the reasonable use of the property
- That such unnecessary hardship has not been created by the applicant
- 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

- 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.

Susan explained that the standard of proof may be lesser (though still specifically established) for certain dimensional requirements, or for “de minimis” very minor deviations from dimensional standards. Finally, a use variance must meet the above five criteria plus a few additional.

At the Commonwealth Court level, there is an expectation that the record clearly establishes that the ZHB applied these standards. If the ZHB did not grant the variance based on these standards, the court will reverse the decision granting the decision.

8. The best basis for good land use regulation is good land use policy.

In terms of what happens next: Panelists advised carefully articulating a land use policy, which will be part of the ongoing conversation shaping Marshall Township’s Implementable Comprehensive Plan. It can be a difficult conversation, Susan said, balancing competing interests in envisioning a collective land use future. “But what doesn’t work is dodging the conversation altogether,” in which case nobody really knows what the ordinances are intended to do.

With a clearly articulated land use policy, the Township can examine the tools in its toolbox – zoning and subdivision regulations, the capital budget and other options – and devise an efficient, effective strategy for using them to achieve its vision for the future of the western side.