

OPEN SPACE COUNCIL  
December 3, 2014, 9:00 a.m.  
Legislative Hall  
Senate Hearing Room, Second Floor  
Dover, Delaware

**ATTENDANCE**

Council Members:

Mr. John R. Schroeder, Chairperson  
Paul Boswell, Esq.  
Mrs. Lorraine Fleming  
Mr. David Humes  
Mrs. Dorothy Leventry

**Ex-Officio:**

Raymond Bivens, State Liaison Officer, LWCF, DNREC

**Advisory To:**

David Small, Cabinet Secretary, DNREC, State of Delaware

**Staff:**

Mark Biddle, Water Stewardship, DNREC  
Matthew Chesser, Parks & Recreation, DNREC  
Patrick Emory, Director, Community Services, DNREC  
Richard Phifer, Fish & Wildlife, DNREC  
David Saveikis, Director, Fish & Wildlife, DNREC  
Elena Stewart, Parks & Recreation, DNREC  
Michael Valenti, Delaware Forest Service, DDA  
Ron Vickers, Parks & Recreation, DNREC  
Rose Ryödi, Parks & Recreation, DNREC  
Timothy Slavin, Director, Historical & Cultural Affairs, DOS

**Visitors:**

David Carter, Audubon Society  
Andrew Manus  
Marlene Mervine, Nanticoke River Watershed Conservancy  
Kate Hackett, Delaware Wild Lands

**I. Call to Order/Introductions/Announcements**

Mr. Schroeder, Chairperson, called the December 3, 2014 Open Space Council meeting to order at 9:06 a.m. He welcomed Council members, staff, and visitors. He introduced Mrs. Dorothy Leventry as the Open Space Council's newest member. Mrs. Leventry is associated with the Mt. Cuba Center and also is a former DNREC, Parks & Recreation employee.

**II. Approval of Meeting Minutes**

Mr. Schroeder asked for a motion to approve the September 17, 2014 minutes. Motion was made to approve minutes as written. Motion carried.

**III. Financial Report**

Mr. Vickers presented the Financial Report:

• Realty Transfer Tax (FY2013 & FY2014):	\$ 9,593,928.47
• Previously Approved Projects (13):	(\$ 8,208,000.00)
• Anticipated Reimbursements (3 projects):	\$ 1,832,500.00
• Balance Available through December 15, 2014:	<b>\$ 3,218,428.47</b>
• Realty Transfer Tax (FY2015 available 12/15/14)	<u>\$ 2,000,000.00</u>
<b>Total</b>	<b>\$ 5,218,428.47</b>

**IV. Old Business**

**A. Completed Projects since September 17, 2014**

- Sussex Stand Alone - Fenwick Island Light Keepers House – Cropper et al.; 0.113 acres purchased on 9/30/14 for \$400,000; \$100,000 endowment will go to the Division of Historical & Cultural Affairs for site management
- James Branch – Golden Acres, LP/Jestic Property; 115.904 acres purchased on 10/13/14 for \$690,000
- Redden State Forest – Conservation Fund/Glatfelter Property – Green Horizons VIIIc; 371.365 acres purchased for \$1,355,000 (\$1,035,000 federal and private; \$320,000 Open Space)
- Kent Stand Alone - Fork Branch – MEB Properties, LLC/Custis (Smith); 60 acres for \$275,000; \$10,000 donation for site management

Mrs. Fleming asked if there were any dedications by the Natural Areas Advisory Council.

Mr. Vickers said the MEB Properties, LLC/Custis property will be dedicated as part of the Fork Branch Nature Preserve. Delaware State University is close to finalizing dedication details for its property. This is adjacent to the previously noted property in the Fork Branch area.

Since 1991, the Open Space Program completed **375 projects**, protecting **56,121.6982 acres**, using **\$257,110,202.01** of Open Space Program funds plus **\$75,561,690.29** of other funds for a total of **\$332,671,892.30**.

**V. New Business**

**A. Conversion of Use**

This agenda item is for addressing any change in use or change in ownership of land purchased through the Open Space Program. The Land Protection Act (7 Del. Code, Chapter 75) details the purposes for acquiring land through this Program. The Act also states that one of the duties of the Open Space Council is to advise and consult regarding any change from permanently protected status of open space lands acquired or protected through the Program.

No projects for discussion.

B. Agency Presentations

State Resource Areas

Mr. Vickers provided Council with an update on the State Resource Areas. The presentation is attached to the minutes. He began with the definition of “state resource area” and “open space” as found in the Land Protection Act.

At the last Council meeting staff was directed to meet with the appropriate officials from each county government and discuss their perspectives on the State Resource Areas. Secretary Small and Mr. Vickers met with each County with Mr. Bivens also at the New Castle County meeting. Discussions were based on four points: 1) reviewing relevant portions of the Land Protection Act; 2) providing copies of the SRA discussion from the September Open Space Council meeting; 3) reviewing maps with the 2006 SRAs, Delaware Ecological Network data, protected lands, and Forest Legacy areas; and 4) taking suggestions from each County as to how to proceed.

The attached presentation provides some specific issues raised by each County. Each County believes it is protecting natural resources through its specific ordinances and wants to see a map reflecting this. This could then be used to see if there are any specific gaps in resource protection. The Counties also wanted to see if there was an alternative to overlay zones as described in the Land Protection Act. Could State Resource Areas be established using a narrative description of the type of lands worthy of protection? Is there another way to accomplish the protection goals for State Resources Areas without using regulations?

Kent County, in particular, was hesitant about the term overlay zone. A few years ago the County introduced an overlay zone for the coastal area of the county. Its intent was to reduce density in this area and provide for transfer of development rights. It was challenged in Chancery Court and the Court ruled against the County based, in part, on the uniformity aspect of the law. Part of the ruling was that an overlay zone could not be placed on part of a zoning category. Mr. Vickers will provide Council with a copy of the Chancery Court ruling.

Another concern is the cost of the public notice aspect of Title 9. Under the law if there is a mandatory land use issue, then each specific parcel owner and neighbors within a specific distance are to be notified and notification signs are to be placed on each parcel. Kent County estimated its cost for notification for the coastal zone overlay would have been about \$200,000.

The Counties agree that everybody wants maps, but how the maps are used or interpreted causes problems. Some people view them as guidance maps. Others view them as part of a private property “takings” process.

Another issue raised was how much protected land is enough. Some people feel we have protected enough. Do we have to do more or should we just target very specific properties such as inholdings or key connectors to protected lands or certain types of resource features? Maybe a broader state resource area map is not necessary.

If State Resource Area maps are produced and provided to the Counties to use according to the Land Protection Act, then the Counties said they want something that is reasonable, affordable, implementable, understandable, and able to withstand a court challenge.

The attached presentation also shows the environmental ordinances and regulations for each County and the land use requirements section of the Land Protection Act. New Castle County and Kent County believe they have met the intent of the law based on each county's current ordinances.

Each of the Counties was pleased to have a face to face meeting. They understand where things stand and the need to move forward and to update the SRA maps. They are also willing to work with the Open Space Council to address the current law or to revise it.

The path forward with the Counties is to map all of the natural resource, recreation and cultural resource lands protected by fee simple ownership, by conservation easement and by agricultural preservation easement. Then map all lands affected by any environmental ordinances or regulations and all lands based on the best current data that are significant natural, recreational or cultural lands. This would be reviewed for any gaps and discussed with the Council and the Counties.

Mr. Vickers also noted the need to work with the Council on the standards and criteria process. He suggested the Council could work "backwards" from a rough guidance map as outlined above and create standards and criteria to address gaps. Or the Council could devise standards and criteria and a map would be created based on these.

Secretary Small stated Mr. Vickers' report was a very comprehensive report of the interaction with the Counties. He noted a common theme was to assess what ordinances are in place now. He said the Counties had not looked at the ordinances in relation to State Resource Areas. He also said there are challenges for DNREC and the Council in terms of moving forward with the proper information to help the Council make informed decisions, keeping all agencies informed as to when legal interests are acquired on properties and how to address the SRA accounting component of the process. He continued that there is overlap among these goals and there are separate ways to define protection. He restated that the Counties appreciated the opportunity to discuss the SRAs and the process moving forward. And whatever comes out of the process would possibly be updated through their comprehensive plan updates.

Mr. Vickers did note that the Land Protection Act was written in 1990 and one of the major items was to move the Counties forward to develop environmental ordinances and regulations. The Counties all acknowledged, to varying degrees, that they have done this.

#### C. Council Open Discussion

Mr. Schroeder thanked Mr. Vickers for this report and asked him to send the report electronically to Open Space Council members.

Mr. Schroeder said that Sussex County does not have any ordinances that prohibit development in floodplains. He asked if this is an issue with FEMA and flood insurance and doesn't this come into play more now than it has in the past.

Secretary Small said that Senate Bill 64 was passed about three years ago. One of the outcomes of that bill was the establishment of a committee to address best practices and modern standards for floodplain management and drainage codes. Standards are being considered based on reviewing floodplain issues nationally and reviewing municipal and county ordinances for any gaps. This was also discussed in context with FEMA requirements and eligibility for flood insurance. These reviews are still underway, including Sussex County.

Mrs. Fleming asked if any of the counties had determined what areas they thought should be protected beyond the ordinances. Do the Counties have a "wish list" of open space lands to be permanently protected?

Mr. Vickers said that New Castle County does require an alignment of open space between subdivisions. Also the County does have a Critical Natural Areas ordinance that uses the State's natural areas maps to provide protection levels for specific natural resource lands. Beyond this each County used its ordinances on a case by case basis. There was not any discussion as to specific maps that the Counties might be producing to identify lands slated for protection.

Mrs. Fleming said New Castle County did want to do this about eight years ago under a different County Planning Director. Since then, that individual left the position.

Secretary Small said the Counties tend to approach it on a site by site, case by case basis, using ordinances and any narrative in the county codes that are appropriate for the site.

Mr. Vickers also noted that ordinances and regulations apply differently to different zoning districts. New Castle County also spoke to the difficulty with maps in how detailed or specific you get with the map and how the perception of the map may be different than the reality of the map.

Mr. Boswell said he believes the biggest problem to overcome is if you identify property in a State Resource Area, then the landowner regards this as some type of taking of property rights or some reducing of the value of their land. He said as he understands it, the counties are not required to use our definition of SRAs. What method do we have, if any, of forcing the Counties to use the definition of state resource areas?

Mr. Vickers said that according to the law the Counties are to receive the SRA maps. They are to use the SRA maps to develop their performance standards and overlay zones. At some point there needs to be some concurrence between the Counties and the State as to what are the standards and criteria for an SRA so the Counties know what they are getting. As the law is written, they are required to do these things.

Mr. Schroeder asked what happens if they don't?

Mr. Boswell asked again what method do we have to enforce it.

Mr. Vickers noted that in 2006 when the attempt was made to update the SRA maps it was noted that this information was to be used in the updates to the County Comprehensive Land Use Plans. If it was not used, then the State Planning Office would not approve the update. This could affect potentially state funding to the Counties.

Mr. Schroeder said the standards and criteria were the cause of the hang-up in 2006. He believes the Council sees this is the area that needs the greatest amount of work. He thinks the Council needs to partner with the Counties and certain municipalities in order to develop the standards and criteria.

Secretary Small said DNREC spent a lot of time developing specific criteria for ranking properties to use for acquiring a legal interest in specific properties. It seems that is a good basis for a tool that could be refined for these SRA criteria. If the Council agrees, staff will begin with that assessment and see where the gaps are. DNREC has discussed that those criteria are focused on ecological value. However, the definition of open space also focuses on historical and recreational lands. There are a couple of ways to look at this. There are areas that could be used for ball fields for recreation. And then there are areas that drive recreational interest because of their ecological value. One point is that open space in any location could be developed into a recreational complex, whether that is active recreation or passive recreation such as hiking trails. These are the types of distinctions that we need to think about as we develop criteria. He also noted that we may need to spend more time in developing criteria for historic sites.

Mr. Schroeder asked if DNREC could go through this analysis and report back to the Council at the March 2015 meeting.

Mr. Vickers cautioned that according to the law it is the Council's duty to develop the standards and criteria. DNREC cannot do this. That was clarified with the Chancery Court ruling on the 2006 maps. Previously, it was proposed that the Council would act as a Committee of the Whole through the Council Chair or members appointed by the Council Chair to work with the Interagency Working Group, as directed by the law, to devise standards and criteria. These would be brought back to the Council for further discussion, followed by a public hearing. He suggested a formal motion to make it clear that the standards and criteria are being developed under the direction of the Council.

Mrs. Fleming noted the law states the Open Space Council can direct staff to perform certain duties. She noted that there are additional things added to the to-do list, in terms of assessing the current ranking system and additional recreational and historical items.

Mr. Boswell noted that over the last 24 years on many occasions there was a ranking with a numerical value placed on properties brought before the Council for consideration. In some cases the numerical factor was not the controlling factor, but instead some unique characteristic or unique situation was the overriding factor. He said he is not sure how you incorporate some of these subjective situations.

Mrs. Fleming said the current ranking system was of some concern in terms of how do you deal with subjectivity. We have to rely on the uniformity of the people doing the ranking. It is difficult to get away from some subjectivity and it is not an absolute science. We have to rely on the experts within the governmental organizations that have a role in ranking.

Mr. Schroeder said the Council would continue with agenda item C. Open Council Discussion after agenda item D. Public Presentations.

D. Public Presentations

Mr. Schroeder invited Mr. Andy Manus to make his presentation.

Mr. Manus said he was pleased to have the opportunity to address the Council. He provided a brief biography of his 38 years in the conservation field ranging from the Sea Grant Program to serving on the North American Wetlands Conservation Council. That Council dealt with wetlands protection in Canada, the United States and Mexico. He appreciated the difficult task the Open Space Council has in determining what lands to protect.

Mr. Manus said he wanted to provide the exclamation point to Mr. Schroeder's comment that the Council needs to move forward with the standards and criteria. He said that some of his comments may be old news. Some of it may insult some folks' sensibilities and for that he apologizes in advance.

Mr. Manus's PowerPoint presentation with slide notes is attached.

Mrs. Fleming thanked Mr. Manus and agreed with his point about timeline. She agrees that things have slipped. Her observation is that Council is wholly dependent, perhaps unreasonably so, on the work of the staff, who have done a wonderful job. But the Council needs to step up and accept the authority and responsibility given to it by the law. People on the Council are all busy people and not everyone is retired or working as a volunteer full time. Mr. Manus made his point well and Council does need to be assertive about how the staff's priorities are set. The Council would not direct the staff, but on the other hand the Council has certain responsibilities.

Mr. Schroeder said Council only meets four times a year and Council is advisory in nature as charted by law.

Mrs. Fleming said that the law states that years ago the Council should have done certain things.

Mr. Schroeder acknowledged that some things were done in the past. He said that today Council should embrace what Mr. Manus and Mr. Vickers have brought forth to the Council and make a decision. He would reserve his recommendation until all comments were finished.

Mr. Vickers said he contacted people involved with the Greenspace for Delaware's Future report and found out it was part of Governor Castle's Quality of Life Initiative. Apparently, there were no changes to the draft report as referenced in Mr. Manus' presentation. Therefore, the draft report was accepted as the final, but no additional "non-draft" copies were produced.

Mr. Manus stated that the record should be checked for any public comments at the time of the draft report and see if those comments are relevant to the current effort to update SRAs.

Mr. Schroeder acknowledged David Carter for comments.

Mr. David Carter, Conservation Chair of the Delaware Chapter of the Audubon Society, said he became concerned with issues related to the State Resource Areas in relation to the recent shenanigans in the Port Penn area. As a result of that he requested the Open Space Council meeting minutes for the past five years and reviewed them for any items related to the SRAs.

Mr. Carter provided a handout with a chronology of the failure of DNREC and the Open Space Council to address the requirements of the Land Protection Act regarding State Resource Areas. The handout is attached to the minutes.

Mr. Carter believes there are serious questions about the management and administration of the Open Space program and if it is being run efficiently and effectively. He feels the Council is doing its best without clear standards and criteria, but questions whether there is any clear way to

measure whether the Council has acted in the most efficient and effective way towards the members of the public and the environment.

Mr. Carter continued that he intends to raise these issues before the Sunset Committee. He thinks there may be a need for judicial clarification as to whether or not, in the absence of standards and criteria, the Council has the right to spend money or whether its decisions could be considered arbitrary and capricious.

Mr. Carter proceeded to go through the points in the handout. He also noted that a DNREC program he managed in 2009 provided \$300,000 towards the development of SRAs without a product produced. He believes that over \$1.0 million may have been spent on this effort without any results. He strongly recommends that the Council and DNREC get moving on the standards and criteria. He does acknowledge that throughout the chronology the Council is struggling to do the right thing. He intends to raise the issue at the Sunset Committee to improve accountability that the Council has mandatory oversight, not advisory review, over the DNREC program. He is not sure who is culpable because the law states the Council shall approve and also that DNREC shall provide assistance.

Mr. Carter believes the process will go forward, but he thinks it is the wrong approach. He believes the Counties should be approached to develop standards and criteria to protect areas that are not regulated under the land use process. He believes the mapping effort should not be parcel based. It should follow something similar to what he had his staff do with the sea level rise analysis; namely, use a 10 meter grid analysis, smooth the edges and get away from specific parcels. The map would then be used as a guide for eligibility for open space consideration. Then, if people bring projects forward, such as Senator Ennis and Mr. Warren, that don't meet the standards and criteria, then those projects would go away. He hoped his review of the minutes was helpful and he will continue to look at other fiscal issues.

Mr. Schroeder thanked Mr. Carter. He asked Council for comments.

Mrs. Fleming agreed that the Council needs to take more of a 10,000 foot view with the mapping as opposed to being in the minutiae.

Mr. Schroeder said the Council needs to elevate the whole SRA issue even more. It is no longer the 1990s. It is 2014. The process needs to begin. He would suggest a motion that would engage DNREC to begin the process of assessing standards and criteria and establishing a timeline for this work.

Mr. Manus said the task of preparing standards and criteria should be done by the members of the Interagency Working Group.

Mr. Vickers said the Interagency Working Group is technical staff from the Department, the County Planning offices, Department of Agriculture, Division of Historical and Cultural Affairs, and DelDOT.

Mr. Manus suggested this group plus some members of the Council should form a committee as a working group to pull this together as a draft form and bring back to Open Space Council.

Mr. Vickers noted that the law states the Council shall work with the Interagency Working Group to develop standards and criteria.

Mr. Schroeder reiterated that he would entertain a motion that directs the Department to begin the process of assessing the standards and criteria as required by the law and to establish a timeline for receiving responses from the Department.

Mrs. Fleming expanded on the motion by stating that the Council wants draft standards and criteria developed by the Interagency Working Group that will be used in identifying and establishing State Resource Areas presented at the March 2015 meeting. This action is being directed by the Council in order to be in compliance with the law. If these draft standards and criteria are ready prior to the meeting, the Council would like to see them before the meeting. Motion carried unanimously.

Mr. Schroeder suggested all Council members be informed of Interagency Working Group meetings and attend as they are able.

Secretary Small thanked Mr. Manus and Mr. Carter for the time and efforts involved with their comments. He noted the points are well taken. He said he and the agency are committed to this process. He wanted to be in the meetings with the Counties to hear first-hand any specific concerns. He agreed with comments by Mr. Manus and Mr. Carter that there cannot be any surprises such as a piece of legislation at the eleventh hour. There must be partnerships and transparency. He stated DNREC's commitment to that.

Secretary Small continued by stating that the Department has struggled with the concept of what these SRA maps should look like. He appreciates the endorsement using "fuzzy" maps. This was also heard from the Counties as well. There has been an evolution of the priorities of this council and the agency to move more toward water quality benefits through this program. He believed that maybe looking at this from a watershed level or water features may be a key part of the process. Again he thanked them for their comments and guidance believed there are areas of agreement. He acknowledged there is a lot of work to do and whatever is ready at that time will be provided at the next Council meeting.

Mr. Schroeder said he was encouraged and reminded all of previous discussions regarding having an attorney involved who is well-versed in environmental law to help avoid what happened with the last SRA process.

Mr. Manus followed up on Secretary Small's comments about a "fuzzy" map. He said as a landowner what offends people is having on a parcel by parcel basis the division or splitting up of their property. He continued that with the chance to redo the SRAs every five years, as a Council, maybe it should be looking at the standards and criteria to be designed in accordance with the state-level policies that are important for natural resources that requires some sort of land protection, either fee simple or conservation easements. The Land Protection Act says to be innovative and creative. The Council could say that for 2-3 years of the next five year SRA period, the program will try to emulate the forestland preservation experiment that was done because wetlands are important in the state and forestland is important in the state. The Council has the ability to be innovative and to use the SRA process to partner with non-governmental

organizations and to leverage funds. This will work if you are clear about what you are doing. By not doing this, all people know is the one experience with SRAs that was blown and viewed as taking private property rights. Standards and criteria should be taken from the purpose section of the Land Protection Act. It should be easy.

Mr. Vickers noted that the law states the maps are to be to the scale of the individual parcel.

Mr. Manus responded that he understands that, but he also heard through discussion that there may need to be some “surgery” on the law. If it was fully vetted and the impediment was removed from the law, then that is a great way to use the SRA process to promote conservation at scale. Good for the Council.

Mr. Chesser said comments were received from landowners during the past effort wanting to know whether the SRAs affected them or not. In the fuzzy approach, people still wanted to know. Does it affect my property or not?

Mr. Phifer said as the Interagency Working Group moves forward on standards and criteria, it would be helpful if that group and the Council received a presentation on the new Delaware Ecological Network effort.

Mr. Manus also brought up Landsaver, which was an effort by the Pinchot Institute to provide parcel information regarding soil types, conservation cost-share program availability and the possibility of air quality and water quality credits. He asked about the status of this in the Department. He said this could be used for technical assistance during the development of standards and criteria. It could be used in discussions with landowners regarding protection and cost-share programs and in focusing on specific watersheds.

Mr. Schroeder called for Executive Session.

## **VI. Discussion of Site Acquisition Contracts - Executive Session**

The Council adjourned to Executive Session at 10:54 a.m. to discuss site acquisition contracts. The Council returned to Open Session at 11:35 a.m.

## **VII. Project Recommendations**

Based on discussion in Executive Session, the Council recommended the following:

### **Division of Parks & Recreation**

- Nemours Foundation – Alapocas Run State Park, New Castle County; donation of 45.935 acres of mature forest and stream corridor; estimated value at \$4.0 million; Council moved, seconded, and unanimously agreed to recommend to the Secretary to accept this property as a donation and to pay up to \$25,000 for closing costs.

### **Division of Fish & Wildlife**

- Deep Creek LLC – Nanticoke Wildlife Area, Sussex County; purchase of three small, forested parcels along Wright’s Creek totaling 16 acres; Council moved, seconded, and unanimously agreed to recommend to the Secretary to purchase in fee simple the Deep Creek, LLC property for up to \$164,000, recognizing there may be a private contribution of 25% of the purchase price.

- Old Meadow Farm – Norman G. Wilder Wildlife Area, Kent County; purchase of 93.6 acres of forest and pasture; potential leverage of federal funds; appraised at \$6,500.00 per acre; survey pending; Council moved, seconded, and unanimously agreed to recommend to the Secretary to purchase in fee simple the Old Meadow Farm property at the appraised per acre value, subject to final survey and also include \$18,000.00 for fencing improvements, with the intention for any federal funds and/or donations be reimbursed to the Open Space Program.
- Reed – Little Creek Wildlife Area, Kent County; purchase of two properties totaling 0.9 acre; provides access to other state land near the Little River; Council moved, seconded, and unanimously agreed to recommend to the Secretary to purchase the Reed property for \$5,300.

Secretary Small thanked the Open Space Council and wished them happy holidays.

**VIII. Next Meeting/Adjournment**

The Open Space Council meetings for calendar year 2015 are March 4; June 3; September 16; and December 2 at the Legislative Hall, Second Floor, Senate Hearing Room, Dover, DE 19901, starting at 9:00 a.m.

Mr. Schroeder asked for a motion to adjourn. The meeting adjourned at 11:44a.m.