

OPEN SPACE COUNCIL  
June 3, 2015  
9:00 a.m.  
Legislative Hall  
Senate Hearing Room, Second Floor  
Dover, Delaware

**ATTENDANCE**

Council Members:

Mr. John R. Schroeder, Chairperson  
Senator Bruce Ennis  
Representative Gerald Brady  
Mr. Wayne Holden  
Mr. David Humes  
Paul Boswell, Esq.  
Mrs. Lorraine Fleming (by telephone)  
Mr. Porter Schutt III

Ex-Officio:

Raymond Bivens, State Liaison Officer, LWCF, DNREC

Advisory To:

David Small, Cabinet Secretary, DNREC, State of Delaware (present)

Staff:

Ralph K. Durstein III, Esq., DOJ  
William Kassab, Esq., DOJ  
David Saveikis, DNREC  
Ron Vickers, Parks & Recreation, DNREC  
Elena Stewart, Parks & Recreation, DNREC  
Richard Phifer, Fish & Wildlife, DNREC  
Michael Valenti, PhD, DDA  
Patrick Emory, DNREC  
Verity Watson, Division of Research, Legislative Council  
Thomas Vinci, DNREC

Visitors:

David Carter, Audubon Society  
Molly Murray, News Journal  
Marlene Mervine, Nanticoke River Watershed Conservancy  
David Eichelberger  
John Still  
Bernadette Curtis, M.D.

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

Mr. Schroeder, Chairperson, called the June 3, 2015 Open Space Council meeting to order at 9:05 a.m. He welcomed Council members, staff, and visitors and recognized Mr. Durstein and Mr. Kassab from the Department of Justice.

**II. Approval of March 4, 2015 Meeting Minutes**

Mr. Schroeder asked the Council to review the minutes and noted that Andrew Manus, prior to the March 4, 2015 meeting, sent an email/letter to Secretary Small and copied all Council members requesting it be added to the minutes. Mr. Schroeder asked for a motion to approve the March 4, 2015 minutes, including Mr. Manus correspondence. Motion was made, seconded and carried.

**III. Financial Report**

Mr. Vickers noted that Council member Lorraine Fleming is joining the discussion by telephone, but will not be voting on any action.

Mr. Vickers presented the Financial Report:

- |  |                        |
|--|------------------------|
| • Realty Transfer Tax (FY13, 14, & 15):        | \$ 9,907,500.11        |
| • Previously Approved Projects (11):           | (\$ 7,245,000.00)      |
| • Anticipated Reimbursements (3 projects):     | \$ 2,528,600.00        |
| • Balance Available through December 15, 2015: | <b>\$ 5,191,100.11</b> |
| • Governor's Proposed Budget FY16              | \$ 3,150,000.00        |

**IV. Old Business**

**A. Completed Projects since March 3, 2015**

- Alapocas Run State Park – The Nemours Foundation: donation of 45.935 acres on 4/30/15
- Auburn Heights Preserve – Center for Creative Arts: 1.49 acres purchased with \$98,630.40 of Open Space funds on 4/28/15
- Auburn Heights Preserve – Center for the Creative Arts: 3.83 acre conservation easement purchased with \$77,595.12 of Open Space funds on 4/28/15
- James Branch Preserve – Rogers/Moyer: 14.20 acres purchased with \$60,000 of Open Space funds on 4/30/15
- James Branch Preserve – Rogers/Moyer: 27.54 acre conservation easement purchased with \$45,000 of Open Space funds on 4/30/15
- Little Creek Wildlife Area – Reed: 1.04 acres purchased with \$5,300 of Open Space funds on 3/25/15
- Wilder Wildlife Area – Tofts: 11.382 acres purchased with \$50,000 of Open Space funds on 3/19/15
- Augustine Wildlife Area – Bennett: 142.32 acres purchased with \$204,500 of Open Space funds, \$698,5000 of federal Coastal Wetlands Act funds, \$35,000 of The Nature Conservancy funds, \$20,000 of Delmarva Ornithological Society funds, and \$1,000 of Delaware Wild Lands funds

Mr. Vickers reported that since the beginning of the Open Space Program in 1990 it completed **386 projects**, protecting **56,438.6088 acres**, using **\$258,718,727.63** of Open Space Program funds plus **\$75,712,690.29** of other funds for a total of **\$334,431,417.92**.

Mr. Vickers provided a report on the Open Space Program divided into fee simple projects and conservation easement projects from July 1990 through April 2015. This was put together based on a request from the Joint Sunset Committee Chair Senator Poore. Of the 385 projects, 344 were fee simple acquisitions at an average cost of \$6,300.25 per acre and 41 were conservation easements at an average cost of \$3,564.49 per acre. See handout.

Mr. Schroeder asked about the status of the Joint Sunset Committee proceedings.

Mr. Vickers said there was a follow-up with the Joint Sunset Committee in March. The Committee recommended six items for the Council to address.

1. The Council is held over until 2016 and is to present progress on addressing criteria for delineation and dedication of open space; on reviewing and recommending state resource area maps; and reviewing and recommending lands for permanent protection according to the state resource area maps. The Council and staff are moving forward on this with updates at each Council meeting.
2. The Council is held over until 2016 to review the twenty five year old Land Protection Act for any changes or amendments. This process is in the early stages.
3. The Council is to do an op-ed article on the success of the Land Protection Act and address future goals. The op-ed was published in the News Journal on May4, 2015.
4. The Joint Sunset Committee is to send a letter to the Governor requesting consideration of appointing a member of the minority community to the Council. The letter is being prepared.
5. The Joint Sunset Committee drafted legislation to amend the Land Protection Act to allow for the removal of Council members with cause. Senate Bill 64 and Senate Amendment 2 to SB 64 were introduced and passed the Senate.
6. The Joint Sunset Committee included in the same legislation the provision to remove any county requirements for Council members.

B. Agency Presentation – State Resource Areas Update

Mr. Schroeder asked for an update on the State Resource Areas.

Mr. Vickers noted that Mr. Holden and Mrs. Fleming are Council representatives to the Interagency Working Group and are leading the discussion going forward on the State Resource Areas.

Mrs. Fleming said the May 20, 2015 Interagency Working Group meeting was well attended and covered many science related items and still allowed time for open discussion. With Mr. Holden's concurrence she wanted Mr. Vickers to go through his presentation and then discuss more specifics.

Mr. Vickers did a presentation reviewing some aspects of the Land Protection Act and progress to date. The presentation is attached. He reviewed definitions and process according to the law. He began presenting a reworked list of items that the land managing agencies consider when selecting properties for protection. The broad categories are inholdings, contiguous property, connectors, specific stand-alone sites, specific habitats, specific geographic regions/watersheds, sea level rise issues, water resource conservation, overlapping transportation concerns, recreational opportunities, and management capacity.

Mrs. Fleming stated she thought there should be a workshop to cover water issues in more detail. This led to further discussion about the timing of upcoming meetings. Mr. Holden emphasized that we need to meet as soon as possible to comply with the Joint Sunset Committee's timeline. Mr. Schroeder noted that this discussion would take place in executive session since it also relates to a lawsuit concerning the State Resource Areas.

Mr. Vickers then presented the next item discussed at the Interagency Working Group meeting (attached). This was the Delaware Ecological Network (DEN), which is a scientific tool that identifies significant natural resource lands through field data, geographic information system data layers, aerial maps, and ecological modeling. The DEN may help in guiding SRA development. The DEN was devised by The Conservation Fund, which was under contract to develop this for Delaware using state-specific information. DEN identifies core forests, core wetlands, and core aquatic areas and quality habitat corridors connecting the core areas. The process also ranked the quality of the core areas. Many of the best-ranked core areas are already protected. It was emphasized that the DEN map is not the SRA map. It is a tool to help understand standards and criteria and to help develop the SRA map.

Mr. Bivens noted that many of the core areas were very similar to Mrs. Fleming's *Delaware's Outstanding Natural Areas* book from 1978.

Mrs. Fleming said this is an excellent tool and is a good foundation for identifying natural lands of concern.

Mr. Vickers agreed and said the DEN does not address recreational and cultural sites. The Division of Historical and Cultural Affairs looks at properties proposed for or already on the National Register of Historic Places.

Mr. Holden asked for a map that would be understood by the general public that shows the DEN, lands protected in the DEN core areas, and land not protected.

Mr. Vickers said he did not have that map with him, but would provide one. He said the DEN core areas as shown are 346,000 acres. Forty four percent of this is already protected in fee simple ownership or conservation easement by public entities or private conservation organizations.

Mrs. Fleming stated that we need to be aware of what stands out on the maps in terms of important lands and how to represent this in a way that is transparent and that does not create takings issues, and is understandable by the general public.

Mr. Holden noted that the DEN acreage is large, but we should not be afraid to say what should be protected and to show the sensitive areas and to be transparent about it. Sensitive areas are not threatening. Landowners of sensitive areas should be happy about that. We should move forward in an open manner.

Mr. Schroeder said as we go through the public workshops that he would rely on Mrs. Fleming and Mr. Holden to make sure transparency is quite prevalent. He also noted that what has been done for twenty five years is an incredible story. Where we are headed will be challenging for many reasons, but transparency has to be there.

Mr. Holden presented his layperson's view of the process over the years. When the law was written twenty five years ago, it was a different legal environment with different attitudes. Now times have changed and you hear about taking of private property rights. The State typically avoided direct intervention in zoning and let the counties deal with that. Yet, the Land Protection Act says the Council is to prepare criteria and maps down to level of individual parcels. He said this is the only incidence he is aware of where the State is so deeply into the use of private property. The SRA maps are to be updated every five years and the counties are to update their comprehensive plans and include the SRAs. When the SRAs were being updated in 2006-2007, there was uproar from the public about possible restrictions on what could be done with private property. The Secretary of DNREC at the time said we are going to back off and let the dust settle. It's been eight years, so the dust has settled, the data is there and the SRAs need to be updated. He viewed the Land Protection Act as having a "stick" that required the counties to enforce environmental standards on land in the SRAs. This "stick" resulted in a lawsuit that the State lost based on the Council not being involved enough in the process. He believes there would have been more lawsuits. He suggested removing from the law items that the Council or State would lose and instead focus on a "carrot" or incentives for land protection. He suggested working with Mike Parkowski, a well-respected and proven environmental attorney, to help create a new approach. This approach should create a process to protect SRAs on a voluntary basis.

Mr. Schroeder said the program does work on a voluntary basis and has worked well for 25 years. He did agree that there are some things that need to be addressed such as how the counties use the SRA maps, what is mapped and does it need to be to the individual property line.

Mr. Boswell said the Chancery Court case was brought based on due process. He remembers the Council laboring over what was required and how to notice certain items. The Chancery Court's decision just dealt with how the criteria were created and did not address any due process issues.

Mr. Schroeder said the onus for creating standards and criteria falls to the Council. However, the Council has limited expertise and must rely on the Department, with Council involvement, to create them.

Mrs. Fleming said that she and Mr. Holden, with legal assistance, would continue to direct the process with the staff and communicate with the full Council. She believes whatever is devised should not be complicated and should be generally understandable by the general public. There should be a strong scientific foundation for the standards and criteria. She also believes there is a need to revise the law at the same time.

Mr. Schroeder said the staff should continue to work with Mrs. Fleming and Mr. Holden in moving this whole process forward in a timely manner.

C. Conversion of Use – Epworth Church

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.

Mr. Schroeder said the Epworth Church – State land exchange was discussed at the last meeting. At this time it appears that the idea of using the land at the end of Holland Glade Road is not being considered. The State and Church are waiting for appraisals on the Church-owned part of the Little League complex and the small piece of state-owned land adjacent to the Church.

Mr. Holden asked why these lands are being appraised. He suggested a resolution to not approve any transfer of preserved land unless there is a majority vote of the Council and there are extraordinary circumstances.

Mr. Schroeder said it does require a Council vote and ultimately would require an act of the legislature.

Mr. Boswell noted that the Council does not approve; it only recommends on this issue.

There was a quick review of the properties being appraised and the use restrictions that would apply. The appraisals and any action would be discussed at the next Council meeting.

Mr. Holden suggested that the Council let the Department Secretary know its feelings regarding land transfers. Referring to the wind turbine in Lewes, he said he did not want to read about something the day after the General Assembly approves epilogue language in the Bond Bill.

Mr. Schroeder noted that unfortunately that it is a long-standing process of the General Assembly to put items in the epilogue.

**V. New Business**

**A. Council Open Discussion**

General discussion continued on how items get pushed through at the end of the legislative session.

Mr. Holden referred to the University of Delaware lands in Lewes and in Newark and how it was proposed to swap them. He objects to the process.

Representative Brady mentioned he did have concern about a past land experience in Wilmington. He suggested that he and Senator Ennis notify the Council members if they hear of any land issues that may be of concern to the Council.

Mr. Schroeder believes the relationship with the current Secretary is good and that if there is any item of concern coming up in the legislature that he would be notified.

Secretary Small pledged he would so notify the Council.

**B. Public Comments**

Mr. Schroeder asked for any comments from the public.

Mr. Carter from the Delaware Chapter of the Audubon Society made comments. He wanted to enter into the public record his op-ed piece that was in response to Mr. Schroeder's article. (Both are attached.) He stressed the need to actively involve the public in an open and transparent process to develop new standards and criteria and to update the SRA maps. Public policy dictates that science and public values both should be part of the process. He believes DNREC is working in a closed-door, elitist manner and needs to have public input to help garner overall public support for land conservation. He noted that the major emphasis for the current litigation brought forth by Audubon is the lack of a detailed plan on how and when to come into compliance with the Land Protection Act. Depending on the outcome of the litigation, he would like to work more closely with the Council to help move the process forward. He believes the most ethical way to approach it is by opening up the process early on to the public. If this is not worked out through a settlement of the litigation, he said Audubon would move forward on the process itself. He restated his idea that the restrictions for protected lands should be available online. This would allow the public to know if protected lands are the subject of any changes such as the land exchange discussed earlier.

Mrs. Fleming asked how she and Mr. Holden could involve the public in the standards and criteria discussion.

Mr. Carter said he would be glad to talk about it if it was cleared by his attorney. He understands it takes a lot of time and effort to run public workshops. But it is necessary to get the public involved.

Mr. Schroeder said they should speak directly, if approved by his legal counsel.

Ms. Curtis, a resident of The Glade residential community, spoke about the Epworth Church – State land exchange. She stated that a majority of the community's landowners are adamant and whole-heartedly against any land exchange that allows the development of land at the end of Holland Glade Road. She was encouraged by what was said at today's meeting regarding the potential for this area no longer being considered. However, she said the residents will still follow this closely and that they do not like the idea of this land being used as a trading card. She read comments from Ann Cyr, a Glade resident, stating that there already is too much development and that the area is losing its charm and character. She concluded by noting the

residents do not like closed door deals and that the Sussex County Open Space Coalition will continue to follow this issue to make sure any action is transparent.

Mr. Schroeder noted there was no other discussion and entertained a motion to go into executive session.

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

The Council adjourned to Executive Session at 10:30 a.m. to discuss site acquisition contracts. The Council returned to Open Session at 12:05 a.m.

#### **VII. Project Recommendations**

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

##### Division of Parks & Recreation

- Faulkner – Trap Pond State Park, Sussex County; purchase of 2.0 acres of forestland with small house and camp store; protects habitat of conservation concern and historic viewshed; provides cost-efficient staff housing and potential to improve amenities for park users through the acquisition of the camp store; will receive a \$10,000 endowment for the property; Council moved, seconded and unanimously agreed to recommend to the Secretary to purchase in fee simple the Faulkner property for \$300,000.

##### Division of Fish & Wildlife

- Eastburn Farm – Blackbird Reserve Wildlife Area, New Castle County; purchase of 202 acres of forest land and farm land as a potential connector to other state land; contains coastal plain ponds and expands public hunting lands; Council moved, seconded and unanimously agreed to recommend to the Secretary to purchase in fee simple the Eastburn Farm property for \$1,484,000, using federal Pittman-Robertson funds and donated funds from the National Wild Turkey Federation for the purchase price and up to \$20,000 of Open Space funds for closing costs.
- Safran – Little Creek Wildlife Area, Kent County; donation of 0.36 acre marsh land as infill to the management area; Council moved, seconded and unanimously agreed to recommend to the Secretary to receive as a donation the Safran property, using up to \$5,000 of Open Space funds for closing costs.
- Lowe – James Branch Preserve, Sussex County; purchase of 2.56 acres of forested upland and riparian corridor adjacent to protected state land; Council moved, seconded and unanimously agreed to recommend to the Secretary to purchase in fee simple the Lowe property for \$74,000.

Mr. Holden said the opportunity to work with landowners in the Great Marsh area is an incredible opportunity for the whole ecology of the area. There is an urgency to move forward with protection in this area due to increasing development pressure from national homebuilding companies.

#### **VIII. Next Meeting/Adjournment**

The next meeting of the Open Space Council is August 5, 2015 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 12:10 p.m.