OPEN SPACE COUNCIL
August 5, 2015
9:00 a.m.
Legislative Hall
Senate Majority Caucus Room, First Floor
Dover, Delaware

ATTENDANCE

Council Members:
Mr. John R. Schroeder, Chairperson
Senator Bruce C. Ennis
Mr. D. Wayne Holden
Mr. David A. Humes
Paul H. Boswell, Esq.
Mrs. Lorraine M. Fleming
Mr. C. Porter Schutt III
Mrs. Dorothy P. Leventry

Ex-Officio:
Raymond E. Bivens, State Liaison Officer, LWCF, DNREC

Advisory To:
David S. Small, Cabinet Secretary, DNREC, State of Delaware (present)

Staff:
Ralph K. Durstein III, Esq., DOJ
William Kassab, Esq., DOJ
Timothy Slavin, Historical & Cultural Affairs, DOS
Patricia Cannon, DEDO
Matthew Chesser, Parks & Recreation, DNREC
Ron Vickers, Parks & Recreation, DNREC
Richard Phifer, Fish & Wildlife, DNREC
Michael Valenti, PhD, DDA
Verity Watson, Division of Research, Legislative Council

Visitors:
David Carter, Audubon Society
Molly Murray, News Journal
Marlene Mervine, Nanticoke River Watershed Conservancy
Brian Boutin, PhD, The Nature Conservancy
Nancy Vickers

I. Call to Order/Introductions/Announcements

Mr. Schroeder, Chairperson, called the August 5, 2015 Open Space Council meeting to order at 9:05 a.m. He welcomed Council members, staff, and visitors. He thanked Council members for attending this special meeting.

II. Approval of June 3, 2015 Meeting Minutes

Mr. Schroeder asked for a motion to approve the June 3, 2015 minutes. Motion was made, seconded and unanimously approved.

III. Financial Report

Mr. Vickers presented the Financial Report:

• Realty Transfer Tax (FY13, 14, & 15):	$12,062,652.41
• Previously Approved Projects (13):	($ 6,655,000.00)
• Anticipated Reimbursements (2 projects):	$ 36,100.00
• Balance Available through **December 15, 2016**:	**$ 5,443,752.41**
• FY16 Funds	$ 0.00

Mr. Vickers noted that fortunately there are some federal funds available to purchase properties, as well as private foundation funds and conservation partners' contributions.

Mr. Schroeder thanked Council members for their support in trying to secure Open Space funds at the end of the legislative session. He noted this was the first time that Open Space and Agricultural Lands Preservation did not receive the same amount of funding.

IV. Old Business

A. Completed Projects since June 3, 2015

- Trap Pond State Park – Faulkner: purchased 1.996 acres with $300,000 of Open Space funds on 6/29/15; received $10,000 management endowment
- Assawoman Canal – McVicker Trust: received donation of 0.1 acre on 6/30/15
- Redden State Forest – Sapp et al.: purchased 10.38 acres with $55,000 of Open Space funds on 7/30/15

Mr. Vickers reported that since the beginning of the Open Space Program in 1990 it completed **392 projects**, protecting **57,188.5641 acres**, using **$262,888,291.17** of Open Space Program funds plus **$94,330,412.03** of other funds for a total of **$357,218,703.20**.

B. Agency Presentation – State Resource Areas Update

Mr. Schroeder thanked Mrs. Fleming and Mr. Holden for all of their time and efforts in working on the State Resource Area Standards and Criteria. The purpose of today's discussion is to review the draft standards and criteria that came out of the work of the special committee. After a draft is accepted, then per the law a public hearing is required. There is consideration to do public workshops. After the public process, a final draft would come back to the Council for a

vote and then give that to the Department to guide the development of the State Resource Area maps.

Mrs. Fleming stated the work began with reviewing the seven statements contained in the purpose of the Land Protection Act. The idea was to create criteria that were general enough and always related back to the purpose of the law. The meeting on August 3 involved the Interagency Working Group and conservation partners, 22 people total. There was very good interaction and they spent time much time on all points and allowed for full discussion.

Mrs. Fleming went over the proposed standards and criteria, which are based on the purpose and on Internal Revenue Service standards for qualifying conservation lands for tax purposes. (The proposed standards and criteria are attached.)

Discussion followed on clarifying the language "natural feature" and "high potential". Natural feature could relate to current or naturalized sites that perform some type of ecological function. High potential was in relation to restoration or accommodation for climate change effects.

Mr. Boswell suggested adding a catch-all phrase that relates back to the purpose of the Land Protection Act. His suggestion was "Property that would otherwise further or satisfy any of the purposes of the Act".

Mr. Holden wanted some clarification as to whether this would be too broad and subject to litigation. He wants "bulletproof" criteria that, if challenged, would not throw out the whole process.

Mr. Durstein responded that catch-all statements are common. As long as the statement clearly is tied to the statute, it should not present a legal problem. Additionally, the process argument from the 2006 litigation of the State Resource Areas was related to how the criteria and maps were produced. It is clear that the intent of the statute was for the Council to represent the public and its meetings and public hearing would allow public discussion of issues. It gives the Council broad authority over its involvement in the process.

Mr. Boswell noted the original 2006 legal complaints should be analyzed to see if we are moving forward correctly now.

Mr. Carter interjected that he doesn't like catch-all phrases because it leaves it too broad of an interpretation and could be manipulated.

Mr. Schroeder said this new phrase will be subject to a vote after all discussion is finished. He asked about the timing of the process.

Mrs. Fleming said there would be a public workshop in each county in late September where the draft standards and criteria would be presented. This would be followed by one public hearing.

After these public comment opportunities the standards and criteria group would reconvene and review comments/changes and then present a final version to the full Open Space Council.

There was discussion regarding the timeframe and the litigation and Joint Sunset Committee recommendations. It was agreed that the criteria process could be completed within six months and this would meet various deadlines.

Mr. Durstein discussed the format of the workshops and the public hearing. Workshops are viewed as an informal two-way format and an opportunity to allow presentations, small group discussion, or even one-on-one contact. The hearing is a formal one-way process that gives the public the chance to present comments, concerns, and issues to the Council and/or a hearing officer. He suggested that Council members may attend and listen at the public hearing, but not respond to specifics. The transcript of the public hearing and submitted comments would be available for review at a later time.

Mr. Holden said that he and Mrs. Fleming would decide the format for the workshops. He also asked Mr. Vickers about the amount of land already protected as it related to the 2006 maps.

Mr. Vickers responded that the 2006 maps encompassed about 282,000 and through fee simple protection, conservation easements, ordinances, and regulations about 7% of those lands were not "protected".

Mr. Holden then noted that maybe 98% of Delaware's waterways did not meet EPA clean water standards. When the criteria and maps are presented to the public, he suggested that the clean water issue would be important to the public and we should emphasize this aspect of land protection.

Mrs. Fleming said that it is also related to what lands are protected. We need to do more to protect freshwater wetlands.

Mr. Bivens commented on the "high potential" comment as it relates to sites like NVF in Yorklyn. This could meet the criteria for mapping if presented as an opportunity for restoration through removal of buildings and contaminated land. It is then available for recreation potential and wetlands and habitat restoration.

Mr. Schroeder questioned the word "high". How is it defined?

Mr. Boswell suggested changing it to significant. This may have better legal standing.

Mrs. Fleming said it would be changed to significant to parallel language in the other bullets.

Mr. Vickers noted that during the 2006 process three public workshops and one public hearing were held. In addition, meetings took place with different constituent groups: conservation

partners, farm bureau, homebuilders association, and the real estate community. He suggested that this same outreach should take place during the current process. This may be appropriate during the mapping phase.

Mr. Schroeder asked for a motion related to accepting the draft of the standards and criteria with the inclusion of the catch-all phrase "Property that would otherwise further or satisfy any of the purposes of the Land Protection Act." Additionally, the phrase "high potential" would be changed to "significant potential".

Discussion took place regarding the standards and criteria process and the timing with the mapping process. From a strict interpretation of the law and based on the Chancery Court ruling, the standards and criteria process needs to be finished before any official mapping begins. The mapping process is based on approved standards and criteria provided by the Council to the Department.

A motion was put forth, seconded and unanimously approved to accept the standards and criteria as presented with the addition of the catch-all phrase and the change from high potential to significant potential. Additionally, the motion includes that this approval is preliminary, pending the outcome of the public workshops and public hearing.

V. New Business

A. Council Open Discussion

Mr. Schroeder stated that Mr. Boswell agreed to head a group that would respond to the Joint Sunset Committee's recommendation that the Council review the Land Protection Act and determine any amendments. Any amendments would be considered by the Joint Sunset Committee at its January 2016 meeting. He asked for any other volunteers.

Mrs. Leventry said she would join the group.

Mr. Boswell requested assistance from the Attorney General's office and the Department's liaison to the General Assembly. The liaison is Deputy Secretary Coats.

Mr. Schroeder said he would like to see a draft at the September Council meeting, if possible. He then noted that four Council members (Schroeder, Boswell, Fleming, Holden) are attending under expired terms. Also Mr. Schutt's term expires at the end of August and Mr. Humes' term expires in November. He continued that Council members continue to serve at the pleasure of the Governor. He also noted that Senate Bill 64 passed and it changes some aspects of the Council terms.

Mr. Vickers presented the changes to the Land Protection Act based on the passage of Senate Bill 64. Previously, the Council representation was three members from New Castle County, two from Kent County and two from Sussex County. The new language is "The membership shall be representative of all counties in the State.". A new section was added: "A Council member may be removed by the member's appointing authority at any time, without notice and hearing, and for any reason, including for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office. A member shall be deemed in neglect of duty if they are absent from 3

consecutive Council meetings without good cause or if they attend less than 50% of Council meetings in a calendar year."

B. Public Comments

Mr. Schroeder asked for any comments from the public.

Mr. Carter thanked the Council for its work and was pleased with the direction of the efforts to get into compliance with the Land Protection Act. He said his board wanted to see specific dates for the public involvement and would be flexible in the time frame if it results in more public involvement.

Mrs. Fleming thanked Mr. Carter for his constructive comments during the meeting on the standards and criteria.

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

VI. Executive Session

A. Pending Litigation

The Council adjourned to Executive Session at 10:30 a.m. to discuss pending litigation.

VII. Open Session

The Council returned to Open Session at 12:00 p.m.

It was moved, seconded and unanimously agreed to accept the tentative settlement agreement with the Audubon Society as discussed in Executive Session.

VIII. Next Meeting Date/Adjournment

The next meeting of the Open Space Council is September 16, 2015 at 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 12:05 p.m.

Draft Standards and Criteria for State Resource Areas*

In accordance with the Land Protection Act, 7*Del. C.,* Ch. 75, to be considered for inclusion in a map/listing of SRAs, land and/or water areas must exhibit one or more of the following:

- Property that contains endangered, threatened, or ecologically significant species, Species of Greatest Conservation Need (SGCN) as defined in the Delaware Wildlife Action Plan, or natural ecosystems;
- Property with a high potential to support endangered, threatened, or ecologically significant species; SGCN; or natural systems;
- Property that is important because of its historical or cultural value or its proximity to an historically significant area;
- Property that includes or enhances important wildlife habitat or migration corridors, as well as potential wildlife habitat or migration corridors;
- Property with forest resources that are significant;
- Property with wetlands, flood plains, or other lands necessary for the protection of water resources;
- Property that contains significant or unique ecosystems, natural features, or geological features;
- Property which is an inholding or contiguous to or nearby lands already preserved by federal, state, local, or other conservation agencies;
- Property that will provide public outdoor recreation;
- Property that will allow natural systems or plants and animals to accommodate or adapt to climate change or other large-scale changes in ecosystem processes.

*Adapted from IRS Code 170(h)