

In The Matter Of:
Delaware Department of Natural Resources
Parks and Recreation

Open Space Program - Hearing
March 23, 2017

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DELAWARE NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
PARKS AND RECREATION

In Re: DNREC Public Hearing
Open Space Program
Regulations Governing the Guidelines
to Evaluate Land Being Considered for
Permanent Protection

Richardson and Robbins Building
Auditorium
89 Kings Highway
Dover, Delaware

Thursday, March 23, 2017
6:00 p.m.

BEFORE: LISA A. VEST, Public Hearing Officer

ALSO PRESENT: ELENA M. STEWART,
Land Preservation Specialist
Planning, Preservation and
Development

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1 THE HEARING OFFICER: We're
2 going to go ahead and get these proceedings
3 started.

4 I want to thank, everyone, for
5 attending tonight. We are here to receive
6 comment, if any wishes to be offered,
7 regarding the Department's proposed new
8 regulation, which will be known as
9 7 Delaware Admin. Code 109. These will be
10 called the Regs Governing Guidelines to
11 Evaluate Land Being Considered for Permanent
12 Protection.

13 A little protocol before we
14 start the proceedings tonight. The Department
15 has a brief presentation, and they have some
16 exhibits that I believe they would like to be
17 entered into the record. Following the
18 Department's presentation, we will then open
19 the floor up to anyone that wishes to offer
20 comment regarding the proposed promulgations.

21 I should also note for the
22 record that the hearing record will not close
23 at the conclusion of tonight's proceedings.
24 Pursuant to current Delaware law, we remain



1 open for 15 days following the hearing. So
2 the record will formally close for additional
3 comment on April 8th, 2017. All comment will
4 bear the full and same weight regardless of
5 whether it's offered here this evening or if
6 it comes in via U.S. mail or e-mail. That
7 being said, I will turn it over to Department
8 staff for the presentation.

9 MS. STEWART: Thank you, Lisa.

10 My name is Elena Stewart. I'm a
11 land preservation specialist with the State of
12 Delaware, Delaware State Parks. I'm going to
13 give you some background as to why we're here
14 tonight.

15 The Land -- the Delaware Land
16 Protection Act was passed in 1990, and it
17 established an Open Space Program. The Open
18 Space Program also gives the state authority
19 to purchase property or conservation
20 easements, which are development rights. The
21 entities of the state that are eligible to
22 buy/purchase land through the Open Space
23 Program are the DNREC Divisions of Parks and
24 Recreation and Fish and Wildlife, also the



1 Department of Agriculture, Delaware Forest
2 Service and the Division of Historic and
3 Cultural Affairs. All land transactions are
4 voluntary, and they're all to permanently
5 protect land in the State of Delaware.

6 The Open Space Council is tasked
7 with advising the Secretary of DNREC on all
8 matters relating to the administration of the
9 Open Space Program. It consists of seven
10 members that are appointed by the governor,
11 and they meet quarterly. Their job is to
12 review land the state agencies bring before
13 them for permanent protection, and they make
14 their recommendations to the Secretary of
15 DNREC on whether to protect these properties.

16 In order to be eligible to
17 participate in the Open Space Program, there
18 is standards and criteria that are agreed upon
19 that were codified in the most recent
20 amendments to the Land Protection Act. They
21 have to include or exhibit, in whole or in
22 part, one of the following criteria -- and I'm
23 not going to go through all the criteria. But
24 they are codified in the recent enactment of



1 the Land Protection Act.

2 Prior to coming to the Open
3 Space Council with a property, staff first
4 uses -- after determining eligibility of
5 meeting one of the standards and criteria. We
6 also evaluate the property using these certain
7 guidelines. These guidelines take into
8 consideration the ecological value of a
9 property, land use of the property and the
10 surrounding properties, cultural and historic
11 resources, water features, recreation, and
12 there's also a section that is subjective.
13 It's a descriptive evaluation and it's project
14 specific questions.

15 The recent amendments to the
16 Land Protection Act in August required us to
17 put these guidelines through the
18 Administrative Procedures Act, and that is why
19 we are here tonight.

20 We -- the Department developed
21 regulations that incorporated these
22 guidelines, and it was published in the
23 Register on March 1st, 2017. This public
24 hearing is to gather public comments on the



1 regulations and associated guidelines.

2 And as Lisa said, these comments
3 can be made tonight. You can provide us
4 comments here or you can provide me comments
5 in writing by e-mail or by mail. And the
6 record is open until April 8th.

7 And I would like to present to
8 Lisa with a list of exhibits. I have ten
9 exhibits that I would like to be incorporated
10 into the record.

11 Did you want me to go through
12 them?

13 THE HEARING OFFICER: Please.

14 MS. STEWART: Exhibit 1 is the
15 Start Action Notice, which was signed on
16 February 7th. And that began the
17 Administrative Procedures Act process.

18 Exhibit 2 is Register Notice
19 2017-01 and the proposed regulations as it
20 appeared in the March 1st Register.

21 Exhibit 3 is a copy of the
22 Affidavit of Publication and the corresponding
23 legal notice advertising the public hearing.
24 And that was published February 26th in the



1 Delaware News Journal.

2 Exhibit 4 is a copy of the
3 Affidavit of Publication and the corresponding
4 legal notice advertising this public hearing,
5 which was published on February 26th in the
6 Delaware State News.

7 Exhibit 5 is the notice of this
8 public hearing as it appears in the Delaware
9 Public Meeting Calendar. The posting date was
10 January 12th, 2017.

11 Exhibit 6 is the Resolution of
12 the Open Space Council stating the support of
13 the Council for these guidelines.

14 Exhibit 7 is the letter from the
15 Forestry Administrator stating the support of
16 the Delaware Forest Service for these
17 guidelines.

18 Exhibit 8 is a letter from the
19 Director and State Historic Preservation
20 Officer stating the support of the Division of
21 Historic and Cultural Affairs for these
22 guidelines.

23 Exhibit 9 is a copy of the legal
24 notice regarding the proposed public hearing



1 as it's posted in the main entry of the DNREC
2 Richardson and Robbins Building.

3 And Exhibit 10 is a copy of my
4 presentation.

5 THE HEARING OFFICER: All right.

6 MS. STEWART: There you go.

7 THE HEARING OFFICER: Does that
8 conclude the Department's comments at this
9 time?

10 MS. STEWART: That does.

11 THE HEARING OFFICER: Okay.

12 Thank you, Elena.

13 Let the record reflect that
14 Exhibits 1 through 10 as identified just now
15 are hereby entered into the formal hearing
16 record.

17 Seeing as how the Department has
18 concluded its presentation regarding this
19 matter, at this time I would open the floor up
20 to anyone that wishes to offer comment.

21 MR. CARTER: I guess I'm the
22 only one. Okay.

23 THE HEARING OFFICER: Please
24 identify yourself for the record.



1 MR. CARTER: Good evening.

2 My name is David Carter. I'm a
3 resident of Townsend, Delaware.

4 Thanks for the opportunity to
5 comment on these Regulations Governing the
6 Guidance to Evaluate Land Being Considered for
7 Permanent Protection.

8 I read them in detail. And
9 after reading the proposed regulations, I
10 found them quite bewildering and not quite
11 clear on what they're actually going to
12 measure.

13 It is a cumbersome system. It
14 provides a host of conflicting criteria to
15 numerically score five categories: Ecological
16 values, land use, cultural and historic
17 resources, water resources, and recreation,
18 ranging from about 80 points to about
19 200 points for those categories without any
20 clear reason of why they work, what scales
21 were there, whether the numerical criteria
22 that they used in their matrix is standardized
23 in any way to be used in a meaningful
24 evaluation system, which leads to some



1 questions on the numerical value of that. And
2 I'll talk about that a lot more in how you use
3 numbers and how you don't.

4 If the intent is to do
5 professional judgment in this, I think we need
6 to be more direct about that and upfront and
7 honest about that and not have a cumbersome
8 numeric system that just confuses the public
9 and doesn't really give us a quantifiable and
10 predictable, statistically valid evaluation.

11 As I said, I can find no
12 meaningful logic or decision-making in this
13 poorly-designed numerical ranking system.
14 Perhaps there's more to it. Maybe you have
15 conducted pretest results and some preliminary
16 analysis sample runs to look at some type of
17 statistical record and validation of these
18 systems.

19 More specifically, have you run
20 the numbers through some form of a statistical
21 model, such as maybe a factor analysis to look
22 at the underlying variable constructs or
23 perhaps a correlation of each of these
24 variables and subvariables used in these



1 matrices to determine really which ones
2 correlate very closely and run together and
3 how that affects your weighting of criteria
4 and whether or not that actually follows in
5 line with the law? It doesn't really give me
6 a good depiction of whether or not this
7 criteria can actually be linked back in a
8 meaningful way to the law.

9 Let's see. Most importantly,
10 the desired outcomes this cumbersome system
11 seeks to achieve are still unclear.

12 As you know, the law also
13 requires the development of a plan, and that
14 plan is to give us more specificity. And the
15 criteria seems to be for a probe thing and not
16 tied to a plan, because the plan hasn't been
17 written yet. That gives me a little bit of a
18 concern in how these will be used, because I
19 think we need to modernize the program. It's
20 been around for many, many years. It's a
21 little bit outdated, or a lot outdated. And
22 we've been doing the same things since the
23 1980s, but our context, our economic situation
24 in the state and available land has changed



1 considerably.

2 Also, has an index of these
3 criteria been developed? They seem to be set
4 up to perform some type of index or scale,
5 which I see no evaluation or validation of in
6 any way that's statistically meaningful and
7 can be used in any definitive way that's going
8 to predict the outcomes in terms of the law
9 for the lands that you purchase.

10 As I said, if you do desire to
11 use quantitative numbers, a simple set of
12 linear regression models need to be developed.
13 Perhaps something as simple as a logistical
14 regression model that treats the statutory
15 goals as a binary dependent variable. That's
16 basically a 0 or 1. You run those regressions
17 based on the criteria that you selected with
18 maybe 1 being, yes, it meets the law and 0
19 being, no, it does not meet the requirement.
20 You use the matrices of your five criteria to
21 develop your index as independent variables.
22 And through that number, you get an odds ratio
23 that gives you a percent likelihood of
24 actually achieving a 1 or meeting the goals of



1 the act. I think that's really important to
2 do so that you have consistency and remove the
3 bias that you have of reviewers in this
4 system.

5 Without this type of analysis, I
6 believe that, in reality, this numerical
7 system is nothing more than a meaningless and
8 misleading checklist where everything can be
9 rated to achieve an arbitrary and politically-
10 desired outcome. Or it can be simply rated to
11 meet some nonstatutory priorities of
12 government agencies and staff, totally
13 disregarding the priorities and purposes of
14 the law or the priorities that are outlined in
15 the required Land Use Plan. In the absence of
16 some form of statistical analysis, the ranking
17 system makes everything important, which, in
18 reality, means nothing is important. And that
19 makes the system meaningless.

20 How will different people rank
21 different open space parcels? Have you
22 pretested for consistency and validated for
23 biases? That's an important factor when you
24 look at an index and scale that's going to be



1 used by numerous people, probably changing
2 over time and each in working calibrate those
3 if you're going to do this numerically.

4 If you don't have a proper model
5 to consistently and fairly collect and process
6 the numbers, you should scrap this criteria
7 and develop a qualitative or descriptive
8 system that is understandable by any
9 reasonable citizen, taxpayer, or visitor to
10 the state. If it is professional judgment,
11 that's fair. You can put that in the
12 regulations, but do that and do that clearly.

13 You have to be honest. Hiding
14 behind a meaningless numerical system is
15 disingenuous and deliberately confusing and
16 misleading. And it can also open the door to
17 the misappropriation and misuse of large sums
18 of funds in this situation, if we ever do get
19 back to \$10 million a year.

20 And, of course, there is another
21 really major problem. There is no plan of
22 what you want to achieve with this criteria.
23 That plan has yet to be written and published.
24 And that should focus this program much, much



1 more.

2 The criteria that is in front of
3 us that we are having a hearing on tonight is
4 clearly putting the cart before the horse.
5 Yes, you do have a broad statute, but you also
6 have a plan that's intended to be regularly
7 updated to refine that. And that criteria
8 should be reflective and updated to do that as
9 well.

10 As I said, as of now, there is
11 no approved Open Space Plan that has been
12 shared with the public outlining what it is
13 that you hope to achieve. This plan is now a
14 requirement under the law that DNREC lobbied
15 the General Assembly to pass in order to
16 circumvent the legal settlement with Delaware
17 Audubon that was reached for their failing to
18 follow the law for several decades.

19 I'm not really sympathetic that
20 the system isn't appropriate or not working or
21 that DNREC has to go through this cumbersome
22 process. I was quite happy with the law
23 before. I just wanted DNREC to follow it.
24 They chose not to follow it and take another



1 route. So they need to do the tough work to
2 get there.

3 Much of the legislative hearing
4 that led to this and the debate and
5 deliberations that led to these new
6 regulations talked about the critical need to
7 update the program for today's need. And
8 particularly discussion took place on focusing
9 on things like watersheds, protection of
10 freshwater wetlands and other targets. These
11 should be completed. They should be published
12 in this plan and measured by the criteria.
13 Since that is not yet done, it is not
14 reflected in anything that's in this criteria.
15 And, actually, if it isn't reflected, it gets
16 buried in this whole statistically invalid
17 model that this thing sets up and really has
18 an arbitrary and capricious measurement
19 system.

20 I think, in my view, what I see
21 in front of us represents DNREC's failure to
22 competently act in good faith to revitalize
23 and retool a very outdated program and
24 Delaware's approach to land protection with



1 large sums of public funds.

2 I don't know if this is a lack
3 of professional capacity or staff, whether
4 it's just laziness or just an institutional
5 arrogance that drives you to want to do what
6 you've been comfortable with after doing it
7 for a very long time. That's quite possible
8 and deeply concerning.

9 It does, however, seem to
10 indicate an unacceptable sense of entitlement
11 that DNREC should be giving tens of millions
12 of dollars a year to do what they wish to do
13 with no clear goals or accountability or
14 update to our contemporary needs in the State
15 of Delaware for land protection.

16 As we saw today in Governor
17 Carney's budget, funding for open space is not
18 a high priority in these austere times. It is
19 imperative that DNREC wake up to this reality
20 and step up with the integrity to set much
21 more specific and publicly salient open space
22 acquisition goals. DNREC's failure to refine
23 and refocus this program will result in the
24 permanent loss of program funds.



1 As a biologist, I know you adapt
2 or go extinct. DNREC's failure to adapt over
3 the last 25 years has put this program on a
4 threatened policy list. Our economic
5 environment now has moved this to an
6 endangered species list. DNREC's continues --
7 DNREC's continued failures will ensure its
8 disappearance as a program from Delaware.

9 With the loss of funds for this
10 year, DNREC now has the time and the
11 opportunity to rethink, revitalize and
12 reenergize Delaware's Land Protection Program.
13 I hope you will think really hard about
14 starting from scratch again with these
15 proposed regulations while you have this time
16 and meet this challenge to revitalize the
17 program.

18 THE HEARING OFFICER: Thank you,
19 Mr. Carter.

20 Did you want to enter that?

21 MR. CARTER: I can edit these
22 and send them to you later.

23 THE HEARING OFFICER: That's
24 fine.



1 MR. CARTER: Like I said, I was
2 typing them in right before I came down.

3 THE HEARING OFFICER: That's
4 fine.

5 Thank you for your comment.

6 Anyone else here tonight that
7 wishes to offer comment?

8 All right. Seeing as how there
9 are no additional members of the public that
10 wish to offer comment, we are going to go
11 ahead and conclude the proceedings at this
12 time. Again, the record should reflect that
13 comment will continue to be accepted through
14 April 8th, 2017.

15 I want to thank everybody for
16 coming.

17 This meeting is adjourned.

18 (The meeting adjourned at
19 6:20 p.m. this same day.)

20 - - - - -

21

22

23

24



C E R T I F I C A T E

STATE OF DELAWARE:

:

KENT COUNTY :

I, Robert Wayne Wilcox, Jr., a Registered Professional Reporter, within and for the County and State aforesaid, do hereby certify that the foregoing hearing was taken before me, pursuant to notice, at the time and place indicated; that said witness was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that the testimony of said witness was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the foregoing hearing is a true record of the testimony given by the witness; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this
23rd day of March A.D. 2017.



Robert Wayne Wilcox, Jr., RPR



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\$	Administrator (1)	7:8	based (1)
\$10 (1)	7:15	appointed (1)	12:17
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