



SPONSOR: Rep. To be Determined

HOUSE OF REPRESENTATIVES  
148th GENERAL ASSEMBLY

HOUSE SUBSTITUTE NO.

FOR

HOUSE BILL NO. 262

AN ACT TO AMEND TITLE 7 OF THE DELAWARE CODE RELATING TO THE LAND PROTECTION ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend Chapter 75, Title 7 of the Delaware Code by making deletions as shown by strike through and  
2 insertions as shown by underline as follows:

3 § 7502. Declaration of policy.

4 The General Assembly finds that:

5 (4) Rapid growth and spread of urban development is encroaching upon, or eliminating, many open areas and  
6 spaces of varied size and character and many sites with important cultural and natural resources. These ~~areas and~~  
7 ~~spaces~~ areas, spaces, and sites, if preserved and maintained in their present open state, constitute important physical,  
8 biological, social, ~~aesthetic~~ aesthetic, recreational, or economic assets.

9 (5) The State must ~~act now~~ continue to protect ~~and to help local governments to protect~~ substantial quantities  
10 of such lands as are now available and appropriate so that they may be preserved and developed for the purposes  
11 enumerated herein.

12 § 7503. Purpose.

13 (a) State agencies may acquire any interest in ~~real property~~ land for the following purposes, to carry out and  
14 expand on the intent of the ~~conservation program described in Volume 65, Chapter 212 of the Laws of Delaware~~ Open  
15 Space Program:

16 (1) To protect and conserve all forms of natural and cultural ~~resources~~; resources.

17 (2) To protect and conserve the biological diversity of plants and animals and their ~~habitat~~; habitat.

18 (3) To protect or expand existing or planned parks, forests, wildlife areas, nature preserves or other  
19 recreation, conservation or cultural ~~sites by controlling the use of contiguous or nearby lands~~; resource sites.

20 (4) To preserve sites of special natural, ~~cultural~~ cultural, or geological ~~interest~~; interest.

(5) To connect existing open spaces into a cohesive system of greenways and resource ~~areas;~~ areas.

(6) To provide for public outdoor ~~recreation;~~ and recreation.

(7) To allow for water resource conservation.

(b) State agencies may ~~acquire property or rights in real property~~ permanently protect land pursuant to this chapter by the use of direct acquisition for cash, by purchase money mortgage, by installment ~~sale~~ sale, or by other methods or incentives as determined by the Secretary after consultation with the Secretary of Finance. State agencies shall not exercise the "right of eminent domain" to carry out the provisions of this chapter. All transactions under this chapter shall be voluntary with a willing landowner.

§ 7504. Definitions.

The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section except where the context clearly shows a different meaning:

(1) "Conservation Trust Fund" means the Delaware Land and Water Conservation Trust Fund established and maintained pursuant to ~~Chapter 47 of this title~~ Subchapter II of Chapter 54 of Title 30, as it may be amended or superseded [repealed].

(3) "Cultural resource site" means land containing at least 1 of the following:

a. Archaeological resources.

b. An area listed or eligible for listing on the National Register of Historic Places.

(5) "Land" or "lands" means real property, including improvements thereon; rights of way; ~~water~~ water, subaqueous land, and riparian rights; ~~easements;~~ easements; ~~privileges;~~ privileges; and all other rights or interests of any kind or description in, relating ~~to~~ to, or connected with real property or water.

(6) "Open space" means any ~~open lands characterized by (i) great natural scenic beauty, or (ii) whose existing openness, natural condition or present state of use, if retained, would maintain important recreational areas and wildlife habitat, and enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources, including environmentally sensitive areas. For the purposes of this chapter, "open space" shall include significant cultural, historical or archaeological sites as determined by state plans and policies adopted by the Bureau of Historic and Cultural Affairs~~ lands the acquisition of which will further one or more purposes enumerated in § 7503(a) of this chapter.

(7) ~~"Overlay zone" means a local zoning district and its associated use, design and environmental performance standards that is superimposed on the underlying zone for the purpose of providing additional protection.~~

(7) "Open Space Program" means the conservation program created to carry out the provisions of this chapter.

51 (8) "Permanent protection" means the acquisition by purchase, gift, grant, bequest, ~~devise~~ devise, or  
52 otherwise of the fee or any lesser interest, development right, easement, ~~eovenant~~ covenant, or other contractual right  
53 in ~~real property~~ land in perpetuity necessary to achieve the purposes of this chapter.

54 ~~(9) "Project" means the planning for, and the acquisition and development of property, undertaken to achieve~~  
55 ~~the purposes of this chapter.~~

56 (10) "Secretary" means the Secretary of the Department of Natural Resources and Environmental Control.

57 (11) "State agency" means, and shall apply exclusively to, the following units of state government which  
58 manage natural and cultural resources:

59 a. Department of Natural Resources and Environmental Control (Division of Parks and Recreation and  
60 Division of Fish and Wildlife); Wildlife).

61 b. Department of State (Division of Historical and Cultural ~~Affairs~~); and Affairs).

62 c. ~~The~~ Department of Agriculture (~~Division of Resource Management~~) (Delaware Forest Service).

63 ~~(12) "State resource area" means those open space lands duly identified by the Council and adopted by the~~  
64 ~~Department for protection.~~

65 § 7505. Delaware Open Space Council.

66 (a) There is created a Delaware Open Space Council to advise the Secretary on all matters relating to the  
67 administration, ~~implementation~~ implementation, and financing of ~~this protection program~~ the Open Space Program; site  
68 selection; methods of protection; and interagency and intergovernmental coordination among public agencies and private  
69 land preservation ~~agencies~~ organizations. The Council shall consist of the following:

70 ~~(b) The Council shall have 9 members. The Council shall consist of the following:~~

71 (1) One member of the Senate appointed by the President Pro Tempore to serve at the pleasure of the  
72 President Pro Tempore.

73 (2) One member of the House of Representatives appointed by the Speaker of the House to serve at the  
74 pleasure of the Speaker of the House.

75 (3) Seven members appointed by the Governor to serve at the pleasure of the Governor, at least 4 of whom  
76 shall be persons who have been active or have shown an interest in preserving open space. The membership shall be  
77 representative of all counties in the State. Appointments shall be for 4-year terms, provided that the terms of newly  
78 appointed members will be staggered so that no more than 4 appointments shall expire annually. Members may be  
79 appointed for less than 4 years to ensure that members' terms expire on a staggered basis. A member appointed under  
80 this paragraph shall continue to serve beyond the expiration of the member's term until a successor is duly appointed.

81 (4) No more than 5 Council members of 1 political party; provided however, that failing or declining to  
82 announce one's political affiliation shall not make such person ineligible for appointment.

83 ~~(5)~~ (b) The Secretaries of the Departments of Agriculture and State, the Director of the Delaware Economic  
84 Development Office, and the State Liaison Officer for the federal Land and Water Conservation Fund, or ~~their duly~~  
85 ~~authorized designees~~ designees appointed by the respective Secretary, Director, or Officer, who shall be ex officio  
86 ~~members of~~ advisors to the Council without voting powers.

87 (d) The Department ~~of Natural Resources and Environmental Control~~ shall furnish clerical, technical, ~~legal~~ legal,  
88 and other services required by the Council in the performance of its official duties.

89 (f) For purposes of conducting business of the Council, 5 voting members shall constitute a quorum. ~~A~~ Except as  
90 otherwise provided in this chapter, a majority vote of the members present at a meeting at which a quorum is present shall  
91 be required on any action or matter before the Council.

92 § 7506. Powers and duties of the Council.

93 ~~The Council shall:~~ In addition to its other powers and duties described in this chapter, the Council shall:

94 ~~(1) Review and recommend to the Department for adoption, after a public hearing, criteria for delineation,~~  
95 ~~and dedication of open space;~~

96 ~~(2) Review and recommend to the Department for adoption, after public hearing, state resource area maps;~~

97 ~~(3) Review and recommend to the Department for approval lands for permanent protection according to the~~  
98 ~~adopted state resource area maps;~~

99 ~~(4) Review and recommend to the Department for adoption, a ranking system to establish land acquisition or~~  
100 ~~permanent protection priorities;~~

101 ~~(5) (1) Advise and consult with the Secretary of the Department of Natural Resources and Environmental~~  
102 ~~Control and with other state land preservation agencies and staff~~ Secretary, Department, and State agencies on  
103 preservation ~~matters;~~ matters.

104 ~~(6) (2) Advise and consult~~ with the Secretary regarding any change from permanently protected status of  
105 open space ~~lands acquired or otherwise protected;~~ protected, pursuant to this chapter.

106 ~~(7) Use the "Greenspaces for Delaware's Future" report prepared by the Department in 1990 as a starting~~  
107 ~~point for carrying out the duties, and purposes of this chapter;~~

108 ~~(8) (3) Promote and assist, in conjunction with state~~ the State agencies, in the development and establishment  
109 of creative and innovative methods to secure the permanent protection of open ~~space~~ space, including ~~but not limited~~  
110 ~~to:~~

- 111 a. Local and regional land ~~trusts; trusts.~~  
112 b. Conservation and preservation easements on a statewide ~~basis; basis.~~  
113 c. Purchase of less than a fee simple ~~property rights; interest in land.~~  
114 d. ~~Program or programs~~ Programs to create financial incentives for private sector contributions to  
115 establish operations and maintenance funds ~~at state resource areas; for open space protected under this chapter.~~

116 ~~(9) Analyze, (4) Encourage the Secretary to analyze,~~ in conjunction with the Department of Finance, the state  
117 and local tax codes and formulate incentives to encourage landowners and developers to ~~donate or retain ownership of~~  
118 ~~their lands in an undeveloped state; maintain their lands that qualify as open space, as defined in this chapter, in an~~  
119 ~~undeveloped state or to donate such lands to the State agencies or private land preservation organizations.~~

120 ~~(10) Coordinate with an interagency working group to be appointed by the Secretary that shall provide~~  
121 ~~technical advice on all matters relevant to this chapter. At a minimum the working group shall consist of state agency~~  
122 ~~technical staff from the Department of Agriculture, the Delaware Economic Development Office, and the Divisions of~~  
123 ~~Historical and Cultural Affairs, Fish and Wildlife, and Parks and Recreation. Nonstate agency membership shall be~~  
124 ~~comprised of representatives from each county government, which may include up to 1 member each from the~~  
125 ~~Planning Department, Parks and Recreation, and or Executive Office, as determined by the County Executive or Levy~~  
126 ~~Court President. The Secretary shall select a chairperson from among the members. The group will work to maximize~~  
127 ~~the use of funds, and use of protection methods other than fee simple acquisition to permanently protect statewide~~  
128 ~~priority projects through utilization of open space criteria and the ranking system adopted by the Department;~~

129 ~~(11) Work with the Department, private nonprofit conservation groups and interested private sector~~  
130 ~~interests~~

131 ~~(5) Encourage the Department, private land preservation organizations, and interested private sector entities to~~  
132 ~~preserve and protect open space for the benefit of the citizens of the State; this State.~~

133 ~~(12) (6) Recommend to the Department for adoption, after public hearing, any rules and regulations as may~~  
134 ~~be necessary to carry out any provisions of this chapter.~~

135 § 7507. ~~State resource areas.~~ Open space: criteria, evaluation, and permanent protection.

136 ~~(a) In furtherance of the purposes of this chapter, the Council shall, in conjunction with the interagency working~~  
137 ~~group, develop and forward to the Department for adoption:~~

138 ~~(1) Standards and criteria consistent with the purposes of this chapter for evaluating the lands and waters of~~  
139 ~~the state for inclusion as state resource areas in the open space program;~~

140           ~~(2) A system for determining the existence and location of state resource areas; their degree of endangerment;~~  
141           ~~an evaluation of their importance; and information related to their natural, historic or open space values;~~

142           ~~(3) A priority ranking system for the acquisition of said lands and waters or rights therein.~~

143           ~~(b) The Department shall carry out the following actions in furtherance of this chapter:~~

144           ~~(1) Designate and adopt state resource areas for inclusion in the open space program. State resource areas~~  
145           ~~shall be shown on maps of sufficient scale to identify individual properties for planning and zoning purposes.~~

146           ~~(2) Update the state resource area maps, in consultation with county governments, at least every 5 years.~~

147           ~~(c) Upon adoption of the state resource area maps the Department shall send copies to the affected county for~~  
148           ~~inclusion in the conservation element of their respective comprehensive plans, and send copies to affected municipalities~~  
149           ~~for inclusion in their respective comprehensive plans. Updated state resource area maps shall also be submitted to said~~  
150           ~~agencies no later than 1 year prior to mandatory comprehensive plan updates as required in the Delaware Code.~~

151           ~~(d) It is the intent of the General Assembly that the Council shall, in conjunction with the Department, analyze the~~  
152           ~~feasibility and advisability of establishing a right of first refusal to purchase any property located within a state resource~~  
153           ~~area. The Council shall propose and recommend to the General Assembly legislation to accomplish the foregoing, after~~  
154           ~~holding public hearings with respect to such proposal.~~

155           ~~(a) To be eligible for permanent protection under the provisions of this chapter, open space must include or~~  
156           ~~exhibit, in whole or in part, 1 or more of the following criteria:~~

157           ~~(1) Land that contains rare species, as determined by on-site verification with landowner permission.~~

158           ~~(2) Land with significant potential to support rare species.~~

159           ~~(3) Land that is important because it is a cultural resource site or because of its proximity to a cultural~~  
160           ~~resource site.~~

161           ~~(4) Land that includes or enhances important wildlife habitat or migration corridors, or potential wildlife~~  
162           ~~habitat or migration corridors.~~

163           ~~(5) Land with significant forest resources.~~

164           ~~(6) Land with wetlands, floodplains, or other lands necessary for the protection of water resources.~~

165           ~~(7) Land that contains significant or unique ecosystems, natural features, or geological features.~~

166           ~~(8) Land that is an inholding, contiguous to or nearby lands that are already preserved or protected, or planned~~  
167           ~~to be preserved or protected, by federal, state, local, or other conservation agencies, groups, or entities.~~

168           ~~(9) Land that will provide for public outdoor recreation.~~

169 (10) Land that will allow natural systems or plants and animals to accommodate or adapt to climate change or  
170 other large-scale changes in ecosystem processes.

171 (11) Land having other characteristics that would make its acquisition consistent with and promote 1 or more  
172 of the purposes of this chapter.

173 (b) Evaluation system.

174 (1) The Council shall develop a system to evaluate open space being considered for permanent protection  
175 under this chapter and shall forward the evaluation system to the Secretary, with a recommendation for adoption. Such  
176 recommendation must be approved by a majority of all of the voting members of the Council.

177 (2) The Secretary shall have the authority to adopt the evaluation system that the Council forwards under  
178 paragraph (b)(1) of this section.

179 (3) The Council may, at its discretion, amend the evaluation system, following the procedure set forth in  
180 paragraphs (b)(1) and (2) of this section.

181 (c) Permanent protection of lands.

182 (1) To permanently protect lands, the Council shall:

183 a. Review lands that the State agencies bring before it for permanent protection.

184 b. Recommend to the Secretary those lands that it determines should be permanently protected under this  
185 chapter. Council may recommend for protection only those lands which are eligible for permanent protection  
186 under subsection (a) of this section.

187 (2) The Secretary shall have the authority to permanently protect lands that the Council has recommended.

188 ~~§ 7508. Land use requirements.~~

189 ~~(a) In order to maintain the protection of the unique ecological functions of state resource areas in a manner~~  
190 ~~consistent with the purposes of this chapter, each county government shall adopt and incorporate overlay zoning~~  
191 ~~ordinances, guidelines and specific technically based environmental performance standards, design criteria and mitigation~~  
192 ~~requirements, where appropriate, that shall apply to significant ecological functions and identified historic and~~  
193 ~~archeological sites on these lands. The guidelines shall designate the boundaries to which they apply and provide a~~  
194 ~~procedure for the appeal of such boundary designations. The zones created hereunder shall overlie and not replace the~~  
195 ~~existing zoning or preclude or prejudice any change thereto. The standards specified in the guidelines shall include, but not~~  
196 ~~be limited to:~~

197 ~~(1) The establishment of frontage, building height, setback and site design requirements that shall apply in~~  
198 ~~state resource areas and which may apply to lands immediately adjacent thereto, which will result in residential,~~

199 commercial and industrial or other uses which minimize the loss of open space and associated values of state resource  
200 area lands.

201 ~~(2) The establishment of technically based specific environmental performance standards and design criteria~~  
202 ~~that shall apply in and may apply adjacent to state resource areas in order to protect the values of said lands.~~

203 ~~(b) The powers granted counties under Title 9 as they pertain to the protection of any natural feature or resource~~  
204 ~~governed by this title, shall be exercised through the adoption of ordinances and land use requirements duly enacted or~~  
205 ~~approved by the county government of each county. Such natural resource protection requirements shall restrict land use~~  
206 ~~activity by means of enactment and enforcement of specific technically based environmental performance standards, design~~  
207 ~~criteria and mitigation requirements consistent with state law and regulations. Minimum lot sizes, density limitations, and~~  
208 ~~prescribed percentages of impervious surface and use limitations and prohibitions shall not constitute performance~~  
209 ~~standards as required herein, however, such limitations and restrictions shall be adopted where appropriate, to establish an~~  
210 ~~alternative means of complying with the purpose and requirements of the overlay zones. It shall be the option of the owner~~  
211 ~~of land to satisfy either (1) the county environmental performance standards, design criteria and mitigation requirement, or~~  
212 ~~(2) the overlay zoning ordinances where such options are made available. The guidelines, performance standards, design~~  
213 ~~criteria of this subsection shall not apply to lands producing agricultural commodities as defined in Chapter 7 of Title 3 or~~  
214 ~~lands under state agency ownership.~~

215 ~~(c) In order to encourage landowners and developers to promote the objectives of this chapter, each county~~  
216 ~~government shall evaluate density bonuses, credits or other incentives and allowances to land owners and developers for~~  
217 ~~lands or resource protection rights thereto, to encourage the permanent protection of open space and/or any natural resource~~  
218 ~~as governed by this title and elect such measures as they deem appropriate. The counties shall evaluate and consider~~  
219 ~~enactment of measures to allow such bonuses, allowances, incentives and credits to have the ability to be sold, transferred~~  
220 ~~or applied, as a matter of right, to other lands to the maximum density permitted by the applicable zoning classification, so~~  
221 ~~long as such action is consistent with the comprehensive plan of the county.~~

222 ~~(d) Counties shall adopt zoning ordinances that enact these guidelines and standards within 18 months after~~  
223 ~~receipt of state resource area maps from the Department. If a county government does not comply with this 18 month~~  
224 ~~enactment requirement, said county shall be ineligible for any funds negotiated for but unexpended under subsection (e) of~~  
225 ~~this section and return to the State an amount equal to Funds expended under an agreement negotiated under subsection (e)~~  
226 ~~of this section.~~

227 ~~(e) The Secretary shall negotiate an agreement and grant a one time amount of up to \$100,000 to each county to~~  
228 ~~assist with compliance of the requirements in this section.~~

229 § 7509. Program administration.

230 (a) The Department shall administer the ~~conservation program described in this chapter~~ Open Space Program. The  
231 Department shall develop, periodically ~~review~~ review, and maintain a comprehensive statewide outdoor recreation and  
232 conservation plan, ~~for consideration and approval by the Council, which shall establish criteria and priorities for the~~  
233 ~~application of funds available for the purposes of this chapter. The Department's existing statewide comprehensive outdoor~~  
234 ~~recreation plan shall be the initial plan for the purposes of this subsection.~~

235 (b) The Department, in ~~conjunction~~ consultation with other public agencies and private land ~~management~~  
236 preservation organizations, shall undertake ~~a special program to acquire or otherwise~~ an Open Space Program to  
237 permanently protect ~~lands within established state resource areas and other lands identified as having state significance~~  
238 open space, as defined in § 7504 of this chapter, according to the ~~procedures~~ provisions of this chapter.

239 ~~(c) Rules and regulations adopted, and contracts entered into, with respect to the Delaware Land and Water~~  
240 ~~Conservation Trust Fund as originally established under [former] § 4733 of this title [repealed] shall remain in effect with~~  
241 ~~respect to the Conservation Trust Fund until amended, revoked or otherwise modified pursuant to this subsection.~~

242 (d) Direct costs associated with the administration of the ~~conservation program described in this chapter~~ shall be  
243 ~~paid from the Land and Water Conservation Trust Fund~~ Open Space Program shall be paid from the Conservation Trust  
244 Fund.

245 (e) Reporting to the Governor and General Assembly.

246 (1) Five years after July 13, 1990, and every 5 years thereafter through the life of the ~~program~~ Open  
247 Space Program, the Secretary and the Council shall report to the Governor and the General Assembly on the status  
248 and accomplishments of the ~~program~~ Open Space Program with recommendations regarding continuation of ~~land~~  
249 ~~preservation activities~~ the Open Space Program.

250 (2) ~~In addition to the requirements outlined above, the~~ The Secretary and the Council shall file annual  
251 reports with the General Assembly detailing accomplishments and activities of the ~~program, including its impact~~  
252 ~~on the tax base of the counties~~ Open Space Program.

#### SYNOPSIS

The Joint Sunset Committee recommended in 2015 that the Open Space Council (“Council”) review Chapter 75, Title 7 of the Delaware Code and submit in 2016 proposed legislation to bring the 25-year-old Delaware Land Protection Act up to date and relevant to today’s needs and standards. This Act is the result of Council’s review and submission.

The amendments made through this Act have several purposes, including:

(1) Bringing consistency to the statutory language of the Delaware Land Protection Act and Council's functions.

(2) Codifying the criteria that the Department of Natural Resources and Environmental Control uses to determine which open space qualifies for permanent protection.

(3) Removing the requirement to create state resource area maps.

(4) Clarifying that the Delaware Land Protection Act establishes a program whereby landowners may voluntarily offer their land to State agencies for permanent protection.

This Act also makes technical correction to conform existing law to the guidelines of the *Delaware Legislative Drafting Manual*.

This Act is substituted for House Bill No. 262 ("HB 262") and differs from HB 262 in the following ways:

(1) This Act clarifies that all transactions under the Land Protection Act shall be voluntary with a willing landowner.

(2) Whereas HB 262 made reference to land with historical, archaeological, and cultural value, this Act creates and defines the term "cultural resource site" to be more precise. Under this Act, "cultural resource site" means land that contains archaeological resources or an area listed or eligible for listing on the National Register of Historic Places.

(3) Adding subaqueous land to the definition of the term "land."

(4) Removing all references to the term "stand-alone land," which HB 262 had added.

(5) HB 262 removed the requirement that the county governments utilize the state resource area maps in the counties' land use planning; this Act removes entirely all references to state resource areas and state resource area maps and their creation.

(6) Clarifying that Council may recommend for protection only those lands which are eligible for permanent protection under § 7507(a) of the Land Protection Act.

(7) Removing reference to the Delaware Wildlife Action Plan.

(8) Removing the word "land" from the terms "open space land" and "open space lands" for consistency of language throughout the Land Protection Act. In addition, "open space" is defined as being land; including "land" in these instances is redundant.

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