

OPEN SPACE COUNCIL
April 6, 2016
9:00 a.m.
Legislative Hall
Senate Hearing Room, Second Floor
Dover, Delaware

ATTENDANCE

Council Members:

Mr. John R. Schroeder, Chairperson
Senator Bruce Ennis
Mr. Paul Boswell
Mr. D. Wayne Holden
C. Porter Schutt III (remote by telephone; no discussion)
Mrs. Lorraine M. Fleming
Mr. David Humes

Ex-Officio:

Raymond E. Bivens, State Liaison Officer, LWCF, DNREC

Advisory To:

David S. Small, Cabinet Secretary, DNREC, State of Delaware (absent)

Staff:

Kara Coats, DNREC, Deputy Secretary
William Kassab, Esq., DOJ
David Saveikis, Fish & Wildlife, DNREC
Matthew Chesser, Parks & Recreation, DNREC
Ron Vickers, Parks & Recreation, DNREC
Elena Stewart, Parks & Recreation, DNREC
Richard Phifer, Fish & Wildlife, DNREC
Kyle Hoyd, Delaware Forest Service, DDA
Patrick Emory, Community Services, DNREC

Visitors:

Andrew T. Manus
Verity Watson, Legislative Council Staff

I. Call to Order/Introductions/Announcements

Mr. Schroeder, Chairperson, called the April 6, 2016 Open Space Council meeting to order at 9:05 a.m. He welcomed Council members, staff, and visitors. He noted that this was a special meeting with the emphasis to be on proposed changes to the Delaware Land Protection Act and House Bill 262. He appreciated everyone attending on short notice.

Mr. Schutt was joining the meeting by telephone. Under advice from the Attorney General's office, Mr. Schutt could listen to the discussion, but not make extensive comments that might impact any vote.

II. Land Protection Act Revisions

Mr. Schroeder noted Council members received copies of House Bill 262, the Substitute Bill for HB 262 (which has not been introduced), and a summary of the differences between the bills. (All items attached.)

Mr. Vickers went through the summary information which provided a chronology of the actions surrounding proposed changes to the Land Protection Act. He noted the Council sent proposed legislation to the Joint Sunset Committee in December 2015. This draft underwent minor clarifications and then was discussed at two different Joint Sunset Committee meetings. In February 2016 the Joint Sunset Committee voted to move forward with the legislation, now known as House Bill 262. Summary points are on the attachment.

Mr. Vickers continued that at the March 2, 2016 Council meeting DNREC presented a process for creating new State Resource Area maps and showed an early draft of such maps. On March 3, an article in the News Journal newspaper discussed the SRA maps. House Bill 262 was scheduled for discussion on March 9 in the House Sunset Committee. Between March 3 and the scheduled March 9 meeting, legislators heard concerns from many landowners and stakeholder groups regarding the SRA maps. As a result of public comments at the March 9 meeting, legislators set up a working group consisting of various stakeholders to discuss HB 262 and public concerns. As a result of these discussions a Substitute Bill for HB 262 was drafted.

Mr. Vickers reviewed the process for allowing public input on both bills through the House Sunset Committee and continuing legislative working groups. At the various meetings the Council was represented by Mr. Schroeder, Mr. Boswell and Mrs. Fleming. The last working group meeting was April 5 and the next is April 7.

Mr. Vickers said it was determined through discussions with Deputy Attorney General Kassab that the full Council should be informed of the two different bills and to discuss in Executive Session how this may affect the settlement agreement that was reached with Delaware Audubon. Therefore, the meeting was able to be called on short notice, allowable under the FOIA law.

Mr. Schroeder stated that he had attended some of the working group meetings. However, he said he could not make a unilateral decision for the Council as to any proposed changes to HB 262 which the Council previously endorsed. Therefore, this meeting was necessary.

Mr. Vickers continued with the differences between HB 262 and the substitute bill as noted on the handout. The major differences between the two bills are the substitute bill takes out all references to State Resource Areas, the Delaware Wildlife Action Plan is removed as a reference from the criteria, and on-site verification with landowner permission is required as part of the rare species criterion. He

said any other suggestions to either bill were to go to Ms. Watson with the Legislative Council for presentation at tomorrow's working group meeting.

III. Council Discussion

Mr. Schroeder asked Mr. Boswell and Mrs. Fleming to provide their comments on the process and the bills.

Mr. Boswell said that HB 262 tried to balance concerns about the SRA maps by taking out Section 7508 that requires that the maps go to the counties and, instead, be for internal use. The perceived harm from some of the public was that as soon as you put property on a map it is devalued, that the maps could still be used by planning agencies and others to restrict how one uses one's property, and that any data used to evaluate the property could be used by others. He said that so much data are in the public domain or could be obtained by using something like Google maps, GIS information or drones that the data collection issue is difficult. HB 262 tried to accommodate some of these concerns. The question is how much more compromise is needed in HB 262 to address some of these issues.

Mrs. Fleming said there was some furor over trespass issues and data collection. Some people were upset with DNREC employees coming onto their land. This resulted in the proposed change to one of the criterion related to rare species. Some of the public wanted any specific references such as the Delaware Wildlife Action Plan removed because of what it contained or how it could be used in the future to prohibit uses of the land. By removing this and the term species of special concern the scientific basis for some of the criteria is weakened. Other people said the criteria are too broad and any part of the state could be in an SRA, including the Pigeon Point landfill.

Mr. Schroeder said the bottom line is that we are trying to get a bill through before June 30. It's obvious that the different groups such as the Farm Bureau and realtors have concerns with the maps having an impact on property values. He said that he has never seen any proof to indicate that it does. He continued that the bottom line as contained in HB 262 is that the maps are only to be for internal use. He knows this doesn't allay fears.

Mrs. Fleming noted that the guidance language is not in HB 262, but it is the Council's understanding that is how they would be used. It might be helpful to add that language.

Mr. Schroeder said maps are the main issue. One idea that was discussed was an opt-out option.

Mr. Boswell said originally people were talking about opting in to the program. Then it was explained that the whole program is voluntary. Then the discussion shifted to opting in to the maps. And then it shifted to opting out of the maps. This discussion came up in the context of transparency that was raised by Delaware Audubon and Mr. Manus. It was noted that you need maps to identify those lands that you are focusing on in terms of where you would be spending public funds.

Mr. Schroeder recognized Mr. Manus and allowed him to join in the discussion at this time.

Mr. Manus said that what he believed people became more comfortable with was couching it in terms of not necessarily maps on a tax parcel basis but on areas where you are going to focus the investment of public dollars for land protection. When the discussion shifted to focus areas and used the analogies of other state and federal programs that use this targeted approach, then people became more comfortable. He said he wouldn't want the Council to back away from having some type of geographical prioritization showing where you want to spend land acquisition funds.

Mr. Manus said he thought the discussion by the Council and at yesterday's working group meeting was good. However, he was troubled by a missing part of Mr. Vickers timeline regarding when the decision was made by the Secretary to ditch the original version of HB 262 that the Council prepared and then to support the substitute bill before Joint Sunset Committee. He said he doesn't know what the Department's position is now. He knows what the Council's position is. It's troubling because you may be working at cross purposes.

Mr. Holden asked who made the decision to ditch HB 262 in favor of the substitute bill.

Mr. Manus said the Secretary did by testifying for it in front of the Joint Sunset Committee.

Ms. Coats said the Secretary and the Department were acting at the direction of the legislature. As described by Mr. Vickers, there was a hearing, there were questions asked, and it was clear there were serious concerns about the maps and the wildlife action plan. So at the direction of the legislature we worked to get to a compromise bill, known as the substitute bill.

Mr. Manus said that what was troubling was his understanding that none of the Council members were aware of this change of position. He said that's not the way you do public business.

Mr. Schroeder said that issue did come up at the House Sunset Committee meeting. The discussion was that the Secretary can make his decision on any position. The Council needs a regular meeting to establish its position. He reiterated he cannot take a position for the full Council.

Mrs. Fleming said that remember the Council is only advisory. The Council can take a position, but the Secretary does not need to abide by it.

Mr. Schroeder said we are being sued about issues that are addressed in HB 262. What is occurring now, the removal of all maps, addresses the part of the suit. This will be addressed in more detail with the Deputy Attorney General in Executive Session.

Mr. Boswell said some members of the Council were aware of the changes in the substitute bill, but could not take a formal position without a legal meeting of the Council with a quorum.

Mr. Schroeder also reminded all that anything that is decided by the Council today could be changed or amended by the legislature, either in the House or the Senate. He did not think the Council needs to come back and meet every time there are any changes to the legislation.

Mr. Boswell said to put it in current terms the legislature has the trump card.

Mr. Schroeder said he thought it was important to discuss where we are now, including the substitute legislation.

Ms. Coats said to clarify there were members of the Council involved in the working group that resulted in a substitute. And there was full knowledge that those members could not act for the whole Council. DNREC was not acting unilaterally.

Mr. Holden said this legislation was enacted 26 years ago and now the present legislature is decimating what was created then. What has changed in this State so dramatically that the present legislature feels the need to change the original legislation's intent.

Mr. Schroeder said the comment he heard from individuals and groups was that the Council is a good group of people doing an excellent job on behalf of the State. He said the issues seem to be with the DNREC. Some members of the public are apparently unable to stay focused on the bill because of other concerns with DNREC, whether that's trespass or devaluation of property. Legislators are listening to the various constituencies. He said he is perplexed about this since we have operated for 26 years without a complaint.

Ms. Coats said there may not have been any complaints, but there have been two lawsuits. She did not think the proposed bills decimate the current law. HB 262 does remove the County requirements which the Council and DNREC agreed on. The substitute bill does take out some things that we view as important. DNREC and the other state agencies involved with the program do rely on data and maps and view that visual imagery as very helpful. But the maps are the focus of concern for the public. In reality the program has been running many years without publishing SRA maps and as noted there haven't been any complaints. As this process has unfolded there are property rights advocates that are using this as an opportunity to address all issues they may have with DNREC. Others are just expressing concerns with the SRA maps. DNREC is looking at can we run this program transparently and appropriately without maps in order to get to consensus and move forward. DNREC is comfortable with HB 262 and is also able to get comfortable with the substitute bill.

Mr. Boswell said you also need to look at this in the context of the lawsuit in 2006, which was not decided until 2009. The maps were presented at that time and we heard the same issues then as we are hearing now - property rights, devaluation, takings. But the Court never ruled on the property issues. It ruled on the technicalities of how the maps were produced. So the maps were void. Now we are back with maps and hearing the same issues. He said he had the opportunity to read the various pleadings and sees the same issues with the current proposed legislation. He also noted that Kent County lost a lawsuit regarding overlay zones. He said that if no legislative changes are made to the original Delaware Land Protection Act it will spawn litigation again and will be hung up in court for another 3-5 years.

Ms. Coats noted that even if DNREC would win on the merits of a lawsuit, it distracts from the program and keeps us from doing our important work.

Mr. Manus said his perspective is that of a private citizen and he has been very supportive of what the Council is trying to do over the last two and half years to bring the Delaware Land Protection Act into the 21st century. He believes the Council has been thoughtful in its approach in trying to look at priorities. He thinks the problem that members of the public and other stakeholders are having is the fact that the law required DNREC to update the maps every five years. He said you can argue about the context or to what level the mapping should be done. However, he said what troubles him is that DNREC chose to break the law. DNREC failed to engage the public every five years and show what was done and how it addressed priority lands. There was more positive dialogue from the stakeholders at the last working group meeting than DNREC has tried to engender by ignoring the law.

Mr. Bivens said that those in attendance at the Georgetown public workshop on the SRA criteria heard more concerns with maps than any discussion on the criteria. He believes an opt-in or opt-out version of the maps makes them even less valuable and presents a large administrative burden. He believes the program has been functioning at a high level over the last decade without maps. The proposed version of maps is more of a forest legacy focus area type map. Yet we are still hearing a lot of concern about these types of maps also. He agreed with Mr. Boswell in that if we have any type of map we will immediately be engaged in a lawsuit which takes us away from the mission of the Land Protection Act and would probably result in reduced funding. When properties are reviewed, the state agencies have pretty much all of the necessary data to complete an evaluation. He was alright with noting that data should be collected with landowner permission. At the same time he did not believe it would be an issue since the program operates as willing buyer – willing seller.

Mr. Schroeder said that there is the other issue of transparency. Without maps the question is where are we spending the public dollars? Even though we functioned for 25 years without new maps, some would suggest now is the time to update the maps. That's the other side of this argument.

Mr. Bivens said the scoring system would help in that decision and the funding will be the driver along with such things as the agency's ability to manage the property and what type of public access. He said we don't know what will happen ten years down the road. Would a place like Auburn Heights or the Glatfelter properties be on the maps? Those were opportunities that came up and we were able to leverage funds. He believes future projects may involve more accessibility and trail heads for existing protected lands. In that case SRA maps would not be as useful.

Mrs. Fleming said each agency has its own wish list. The maps could be agency priority maps. She also noted there are ecological needs. These may be forestlands or freshwater wetlands. Maybe the State as a whole has an obligation to protect these habitats. She believes the Council is trying to balance all of these needs. She knows the Secretary hears from various sources about protecting different areas such as wetlands or the Delaware Bayshore.

Mr. Bivens said he would like to get beyond the legislation issue and move to what Mr. Holden has expressed at previous meetings and get to incentives for landowners.

Mr. Boswell said that he suspects that looking at the 1990 maps and the 2006 maps that most of land acquired through the years falls within the 2006 maps. He also thought that the stand-alone maps were opportunities, usually at a bargain sale or leveraged with other funds. The evaluation that each parcel goes through would in fact ensure that it meets the underlying criteria of the law at a much more detailed level.

Mr. Holden said that every conservation organization has maps. As an example, The Nature Conservancy focuses on rare species, wildlife habitat and the Bayshore wetlands. He finds it difficult to understand why anyone who understands maps would be fearful of them. Every group has them. Some include corridors that involve many areas of the state.

Mr. Schroeder said the difference is the SRA maps are now being used by a State agencies. Now there is the perception that something has been done to your property. He believes it increases the value. Other people feel differently.

Mr. Holden asked why can't maps be created by others like The Nature Conservancy and then the State adopt them. It would not be a DNREC map, but it would be used by the agency.

Mr. Schroeder said it would probably still be subject to a law suit. It seems that if it is a map used by the government that is the issue, regardless of who put it together.

Mr. Boswell said he has not fully researched it, but he doesn't believe that just by putting land on a map that it is a takings issue. He said it is a perception that is being created by some that is affecting the legislature in its efforts to get this legislation passed.

Ms. Coats said that the current Land Protection Act does require the counties to act on the SRA maps. So with that requirement the perception with the public is the maps could be used to create more regulations. With the requirement for overlay zones, the concern is very understandable.

Mr. Boswell said the removal of Section 7508 (the County use requirement) would make the claim of a takings by an individual marginal.

Mr. Manus said another issue is how much state-owned land is enough. Maybe after 25 years the state-owned system of lands - parks, forestry and fish and wildlife - has matured to a point where they are where they need to be. Some people are interested in that this is a Delaware land protection act, not a DNREC land protection act. For Delawareans what are the other most important areas in the state that need protection. How do you engage private landowners in land protection in a way that complements the type of resource management and stewardship that provides for clean water, healthy air and good habitat. That's the challenge. He said what disturbs him is that we could have been

having this forward thinking discussion every five years if DNREC had been engaged in the process of updating maps. Maps trigger the questions of what are the priorities.

Mr. Schroeder thanked Mr. Manus for his comments. He said we need to move this whole process forward. He hoped the Council understands the situation based on today's discussion. The options are to continue to support HB 262 or the substitute bill or support HB 262 with new provisions such as opt-out provisions. He was not asking for a vote at this time. These and related issues will be discussed in Executive Session as it relates to the Delaware Audubon lawsuit. If there are maps with an opt-out provision, it might alleviate some concerns. And we would still be working with willing sellers on a voluntary basis. This may help negotiate getting a bill through this session. Politics is the art of negotiation. The Council may decide to still support HB 262 and hope that legislatively it can still go through. Or we may need to negotiate with some of the interest groups and compromise on some items, such as opt-out with the responsibility placed on the landowner, creating purely advisory maps or only use data internally, to get a bill through. He asked for any other thoughts as to how to move the process forward.

Ms. Coats said DNREC still remains open to the concept of opt-out. However, it would be very difficult logistically and impose a great administrative burden. She said there are probably over 5,000 tax parcels involved. If you do not map to a tax parcel level, how do you give notice, how do you remove a parcel and how do you lay it out in the law. Opt-out may be interpreted in many ways. She noted that at yesterday's meeting a landowner said he was in favor of the opt-out provision. He said he wanted to opt-out of the map, but then stated that DNREC could contact him to talk about buying his land. Other people were saying once you opt-out, then DNREC should not approach you. To work through these issues would be a very complicated process.

Mr. Schroeder said if maps are created, then it would be up to the landowner to contact DNREC and opt-out. If someone opts out, it means that DNREC would not contact them about their property. It doesn't mean the maps would be redone every time someone doesn't want to participate. The opt-out is to say someone does not want to be contacted.

Mrs. Fleming said most of the time the agencies are not contacting landowners. It is usually the landowner contacting the agencies.

Mr. Schroeder said you could create the maps and then give everyone some time, such as 90 days, to opt-out.

Mr. Vickers said that is a perception problem of if you have maps and then someone opts-out, but the property is still on the map, then the landowner may still feel they are subject to some other action. If you take properties off a map, then you end up with a Swiss cheese map. How do you notify a new owner or an heir or what if someone changes their mind and wants to opt-in.

Mr. Boswell said this would be a complicated process and would need to be addressed through regulation, not in the law. It would be a logistical and administrative nightmare.

Mr. Holden said this whole process bothers him. It seems there is a lot of denial by the landowner. What DNREC is trying to do is to identify properties that are environmentally sensitive or that are important for many other reasons. The property is what it is. All the State is trying to do is to put it on a piece of paper and say these are sensitive properties. Water companies map this information all the time, particularly since they are doing water supply and sewer. It's almost like we are trying to enable denial.

Mr. Schroeder said it is very frustrating to hear that the SRA maps negatively affect the property value. He said if anything it would increase the value because you would already have a potential buyer in the State. Also if you are next to protected land it increases the value of your property. He sees it all the time in his area around Cape Henlopen State Park.

Mr. Bivens said that some people would argue that land outside an SRA is more valuable than land in an SRA. Many of the lands in an SRA would be of lower value because many sites are wet or undevelopable. But the argument would be that because it is in an SRA it is less valuable. He suggested an analysis could be undertaken.

Mr. Schroeder reminded the Council of the appraiser that stood up at the criteria workshop in Sussex who said that he knew it would devalue everyone's property.

Mr. Boswell stated that an appraisal is not an exact science. In his experience he has seen values on property vary based on the reason it is being appraised and someone's position in litigation.

IV. Public Comments

Mr. Schroeder noted that Mr. Manus was the only member of the public in attendance and he appreciated his earlier comments and asked if he had any other comments.

Mr. Manus said he believes the messaging needs to be improved. One thing to make very clear is that HB 262 eliminates the coupling of the maps to the County land use plan. The other thing is that the mapping is focusing where investments should go. It is not requiring any landowner to participate in the program. It just says it was mapped, it's important and you are eligible to participate. It is voluntary. It's messaging and keep engaging the public in this type of discussion as opposed to sitting in silence.

Mr. Boswell wanted to raise the issue of the counties using the SRA maps. It may be advisable to add language to the statute that says the counties may use or not use the maps for land use planning and the failure to use the maps would not affect the comprehensive land use plan.

Mr. Holden acknowledged Mr. Manus's work to bring the thousands of acres of Chesapeake properties into protected status through his work with The Nature Conservancy in partnership with the State.

Mr. Manus said he thinks everyone likes the Open Space Council. But he said it is frustrating because there is not enough engagement with the public and we need to be clear on our goals and objectives in order to get back to partnership building.

The Council adjourned to Executive Session at 10:20 a.m.

V. Executive Session

A. Legal Advice on Litigation

The Council returned to Open Session at 11:24 a.m.

VI. Open Session

A. Council Action/Recommendations

Mr. Schroeder asked for any comments or motions.

Senator Ennis moved that the Open Space Council endorse the existing HB 262 and oppose the Substitute Bill for HB 262 in its present form, pending further discussions by the task force. The motion was seconded. The motion passed 5 (Schroeder, Ennis, Boswell, Fleming, Holden) to 1 (Humes).

Mr. Boswell moved that the Open Space Council Committee on the Land Protection Act continue to be engaged in the legislative process surrounding HB 262 and that Mrs. Fleming be added to the Committee. The motion was seconded and passed unanimously.

VII. Adjournment

The Council adjourned at 11:30 a.m.

Handout for April 6, 2016 Open Space Council Meeting

House Bill 262 versus Substitute Bill for HB 262

The Joint Sunset Committee recommended in 2015 that the Open Space Council review the Delaware Land Protection Act (7 Del. Code, Chapter 75) and submit in 2016 proposed legislation to bring the 25-year-old law up-to-date and relevant to today's needs and standards.

At the December 2, 2015 Open Space Council meeting proposed legislation, prepared by a subcommittee of the Council that was discussed at two full Council meetings, was recommended by the Council to send to the Joint Sunset Committee. With a few minor changes related to format and clarification, the resulting proposed legislation was introduced as House Bill 262.

In summary, House Bill 262:

- (1) Brought consistency to the statutory language of the LPA and Council's functions.
- (2) Codified the criteria developed by the Council that DNREC will use to determine state resource areas.
- (3) Removed the requirement that county government use the state resource area maps in the county's land use planning.
- (4) Clarified that the LPA establishes a voluntary land protection program.
- (5) Provided better definitions for terms in the LPA.

At the March 2, 2016 Council meeting DNREC presented a process for creating the State Resource Area maps and an early draft of such maps. After this meeting and a subsequent newspaper article on the draft SRA maps, legislators at a House Sunset Committee on March 9 asked many questions about the SRA process and heard many public comments against any type of maps. At the request of the legislators, a working group met to discuss these issues, resulting in the legislators asking for an alternative bill that would address the public concerns. The alternative bill is Substitute Bill for HB 262. On March 22 the full Joint Sunset Committee addressed public concerns. On March 23 the House Sunset Committee accepted public comments on both bills. On April 5 Legislative Council staff held a working group to discuss the differences in the bills. Another working group is scheduled for April 7.

In summary, Substitute Bill for HB 262:

- (1) Removed all references to State Resource Areas and maps.
- (2) Clarified cultural resource sites.
- (3) Removed stand-alone sites.
- (4) Removed reference to the Delaware Wildlife Action Plan and added on-site verification with landowner permission to the rare species criterion.
- (5) Clarified that all protection actions are voluntary with a willing landowner.