

DELAWARE OPEN SPACE PROGRAM

I. Overview

Located among the large metropolitan areas of Washington, D.C., Baltimore, and Philadelphia, the State of Delaware recognizes its vulnerability to dispersed development and changes in the landscape. The state instituted the Delaware Open Space Program in 1990 to coordinate state acquisition of parks, fish and wildlife areas, forests, nature preserves, and cultural sites. Operating as Delaware's major open space acquisition program, the program has protected 43,652 acres since its inception in 1990.¹

The Open Space Program has clear legal authority to prioritize land in a biologically meaningful manner and utilizes a structured prioritization process to do so. The development and implementation of the state wildlife action plan (formerly known as the Comprehensive Wildlife Conservation Strategy) is directly coinciding with the current revision of the Open Space Program's land protection prioritization process.

II. Delaware's Open Space Program

The Delaware Open Space Program is authorized under the Delaware Land Protection Act² to "...protect and conserve all forms of natural and cultural resources [and] ... the biological diversity of plants and animals and their habitat;" "protect existing or planned parks, forests, wildlife areas, nature preserves or other recreation, conservation or cultural sites by controlling the use of contiguous or nearby lands;" "preserve sites of special natural, cultural or geological interest;" "connect existing open spaces into a cohesive system of greenways and resource areas;" "provide for public outdoor recreation;" and "allow for water resource conservation."³ The Delaware Department of Natural Resources and Environmental Control (DNREC) - Division of Parks and Recreation administers the program and has staff biologists and ecologists to manage the program.⁴ The Delaware Open Space Council⁵ serves in an advisory capacity, reviewing and recommending acquisitions for the program.⁶

¹ Email from Ron Vickers, Manager, Delaware Department of Natural Resources and Environmental Control - Division of Parks and Recreation - Land Preservation Office, to Roxanne Thomas, Science and Policy Analyst, Environmental Law Institute (April 6, 2005, 16:49:00 EST) (on file with author).

² DEL. CODE ANN. tit. 7, § 7501, *et. seq.*

³ DEL. CODE ANN. tit. 7, § 7503.

⁴ Telephone Interview with Ron Vickers, Manager, Delaware Department of Natural Resources and Environmental Control - Division of Parks and Recreation - Land Preservation Office (April 6, 2005).

⁵ The council is composed of eleven members: one member of the state senate, one member of the state house, and nine members appointed by the governor (apportioned by county). The Delaware Secretaries of Agriculture and State, the Director of the Delaware Economic Development Office, and the State Liaison Officer for the Federal Land and Water Conservation Fund (or their duly authorized designees) serve as *ex officio* members of the council without voting powers. DEL. CODE ANN. tit. 7 § 7505.

⁶ *Id.*

Program Funding

Over the years, the Open Space Program has been funded by a variety of sources, including land and water conservation bonds, realty transfer taxes, and state appropriations. The Open Space Program's funding is connected to a Land and Water Conservation Trust Fund (LWCTF) that was established in 1986 to provide funding for the acquisition and development of local parks and greenways. By law, the LWCTF's principal must remain intact, while generated interest is used to provide grants for local projects.⁷ The LWCTF is supported by the same funding sources as the Open Space Program and receives \$1 million per year from the state's realty transfer tax until such time as the principal of the fund reaches \$60 million dollars. As of 2005, the fund's principal was \$43 million. The Open Space Program receives \$9 million annually from the state's realty transfer tax and will continue to do so until the \$60 million cap is reached on the principal of the LWCTF. Thus, this funding mechanism will continue until the year 2017.⁸

The amount of funding that has been expended over the life of the Open Space Program (1990 to 2005) is approximately \$212 million, with roughly \$196 million allocated from the state and approximately \$17 million from federal sources or other contributions.⁹

III. Land Protection Strategies

Land Protection Tools

Delaware's Open Space Program protects land through multiple mechanisms, including fee simple purchase, bargain sales, donations, and conservation easements, as well as purchase of development rights.¹⁰

Prioritizing Land Acquisition

DNREC is responsible for designating and adopting State Resources Areas (SRAs), or open space lands identified for protection and inclusion in the program.¹¹ However, Delaware law stipulates that the Open Space Council must "develop and forward [the following items] to the Department for adoption: (1) standards and criteria ... for evaluating the lands and waters of the state for inclusion as [SRAs] in the open space program; (2) a system for determining the existence and location of state resource areas, their degree of endangerment, an evaluation of their importance, and information related to their natural, historic or open space values; and (3) a priority ranking system for the acquisition of said lands and waters or rights therein."¹² In essence, the council is charged with developing SRA maps to guide land acquisition decision-making and must review and recommend land acquisition projects to the DNREC.

⁷ DEL. CODE ANN. tit. 30, § 5423. *See also:* Delaware Department of Natural Resources and Environmental Control, Division of Parks and Recreation, *Delaware Land and Water Conservation Trust Fund*, at <http://www.destateparks.com/greenway/grants.htm> (last visited April 29, 2005).

⁸ Email from Ron Vickers, Manager, Delaware Department of Natural Resources and Environmental Control - Division of Parks and Recreation - Land Preservation Office, to Roxanne Thomas, Science and Policy Analyst, Environmental Law Institute (May 31, 2005, 19:39:00 EST) (on file with author).

⁹ Vickers, *supra* note 1.

¹⁰ Vickers, *supra* note 4.

¹¹ DEL. CODE ANN. tit. 7, § 7507.

¹² *Id.*

A 1989 report entitled *Greenspace for Delaware's Future*, authored by the governor-appointed Greenspace Committee, highlighted 19 SRAs comprising 210,000 acres that should be targeted for protection due to their "natural and cultural heritage and biological diversity."¹³ SRAs are primarily in-holdings and lands adjacent to existing protected lands, such as federal, state, local, and private conservation lands.¹⁴ The report also identified several "stand alone" sites that were considered a high priority for protection because they included "state-recognized unique natural areas, habitat for rare and endangered species, cultural resources, mill ponds, freshwater wetlands, and stream valley corridors."¹⁵ Three criteria were used to select the sites: the presence of multiple outstanding resources of statewide importance; the presence of a single exceptional ecological, botanical, geographic, historic or geologic attribute of state, national, or international importance; or public access to outdoor recreational opportunities.¹⁶

At the time the SRAs were identified, the DNREC Division of Fish and Wildlife - Natural Heritage Program (NHP) was still in its infancy. As a result, heritage data were not included in the original identification of sites (although sites identified as important by NHP were captured through the designation of "stand alone" sites).¹⁷ The SRAs were identified using natural areas maps, aerial photos, and what heritage and database information that was available. The Open Space Program is currently in the process of revising the SRAs to include more complete biological information and natural resource information from the NHP and ground-truthing that has been conducted since 1990.¹⁸

Lands are identified for acquisition through a comprehensive rating process. State land management agencies¹⁹ identify their priority projects that fall within the SRAs to an interagency workgroup. The interagency workgroup reviews the projects along with relevant planning documents and completes a rating sheet. The rating sheets score projects based on 20 natural, cultural, recreational, and locational attributes.²⁰ These attributes include: plants (species of federal concern, species of state concern); animals (species of federal concern, species of state concern); tidal wetlands; nontidal wetlands; riparian habitat; water recharge; geologic features; cultural or historic sites; forest resources; natural communities (based on Delaware Natural Heritage Inventory rankings which represent an assemblage of plants, animals and ecological communities); research, science, and educational values; unusual conservation interest; proximity to state resource areas; proximity to existing recreational or cultural lands; sufficiency to protect primary resources; public access; size of property; recreational development

¹³ DE. DEPT. OF NAT. RES. AND ENV'L CONTROL, GREENSPACE FOR DELAWARE'S FUTURE, PUB. NO. 35.242, DOC. NO. 40-09-93-12-02 35, at 9 (1989).

¹⁴ One of the purposes of the Open Space Program is to "...connect existing open spaces into a cohesive system of greenways and resource areas." DEL. CODE ANN. tit. 7, §7503. The Greenspace Committee relied upon this purpose when developing the map of state resource areas.

¹⁵ Del. Dept. of Nat. Res. and Env'l Control, *supra* note 13, at 4.

¹⁶ *Id.* at 9.

¹⁷ DNREC has subsequently evaluated the effectiveness of the rating process and found that approximately 60 percent of the acquisitions included heritage elements.

¹⁸ Vickers, *supra* note 4.

¹⁹ Four divisions are able to purchase land under the Open Space Program: DNREC - Division of Parks and Recreation, DNREC - Division of Fish and Wildlife, Delaware Department of Agriculture - Forest Service, and Delaware Department of State - Division of Historical and Cultural Affairs.

²⁰ Vickers, *supra* note 4.

(opportunities); passive recreation (opportunities); and water-based recreation.^{21,22} All available information, including heritage data and GIS assessments, is used to rate projects. Once the interagency workgroup has reviewed potential projects with the sponsoring agency, it makes recommendations to the Open Space Council. The council then reviews the information and recommends acquisition projects to the DNREC.²³

Protection in Perpetuity

Once land has been titled to the state through the Open Space Program, it is entered into permanent protection.²⁴ While acquired land cannot be sold on the open market, lands may be transferred under specific circumstances – if the land being traded is of equal or greater fair market value and if the resources or issues of concern meet the managing agency’s needs better. However, the transfer of lands is extremely rare and has occurred only one time since the program’s inception.²⁵

Interest from the LWCTF principal provides for the long-term stewardship of acquired lands. Annual funding varies because interest that is generated by the LWCTF is allocated for three purposes: (1) \$750,000 goes to a local matching grants program for park acquisition and development; (2) \$750,000 goes to a local matching grants program for greenway acquisition and development; and (3) any additional interest generated above and beyond that \$1.5 million is allocated for stewardship. Stewardship funds are derived from the same mechanism as acquisition funding (described above), and so will continue to be allocated until the LWCTF reaches the \$60 million cap in 2017. Stewardship funds are apportioned among the four divisions that are able to purchase land under the Open Space Program: DNREC Division of Parks and Recreation (35 percent); DNREC Division of Fish and Wildlife (35 percent); Delaware Department of Agriculture - Forest Service (20 percent); and Delaware Department of State - Division of Historical and Cultural Affairs (10 percent). Each of the four agencies has its own adopted management plans and strategies, depending on the nature of the land parcel and the purpose for which it was purchased. For example, the Division of Parks and Recreation may use stewardship funds for invasive species management, reforestation, cultural resource surveys or other management activities. The Division of Fish and Wildlife may use funds for the site-specific management of a rare species, wetland restoration projects, or other management activities.²⁶

IV. State Wildlife Action Plan

DNREC’s Division of Fish and Wildlife - Natural Heritage and Endangered Species Program developed and submitted the state wildlife action plan (formerly known as the Comprehensive

²¹ Three attributes – plants, animals, and natural communities – explicitly relate to biodiversity. Others – tidal wetlands, nontidal wetlands, riparian habitat, forest resources, unusual conservation interest – indirectly relate to biodiversity.

²² Delaware Department of Natural Resources and Environmental Control - Division of Parks and Recreation, Open Space Rating Criteria (on file with author).

²³ Vickers, *supra* note 4.

²⁴ DEL. CODE ANN. tit. 29, § 9406.

²⁵ Vickers, *supra* note 4.

²⁶ *Id.*

Wildlife Conservation Strategy) in 2005, with the ultimate goals of keeping species off of the endangered species list, preserving the state's natural heritage, saving taxpayers' money, and passing on a healthy wildlife legacy to future generations.²⁷ The plan addresses the following elements: distribution and abundance of wildlife species; location and condition of habitats vital to conserving priority species; threats that may harm wildlife and habitats; priorities and strategies for conserving species and habitat; the effectiveness of conservation actions; and annual assessments of effectiveness of actions.²⁸ The Open Space Program is integrating the Delaware Wildlife Action Plan into its acquisition prioritization strategy implicitly. The same data used to compile the plan is being used to revise the state's SRAs.²⁹

V. Summary

Authorized by Delaware law to prioritize land acquisition, the Open Space Program does protect biodiversity through the purchase of land and utilizes a structured prioritization process to do so. The prioritization strategy is being updated with the same data used to develop the wildlife action plan; thus, priorities are likely to complement the elements contained in the plan.

²⁷ Delaware Department of Natural Resources and Environmental Control, Division of Fish and Wildlife, Natural Heritage and Endangered Species Program, *Comprehensive Wildlife Conservation Strategy*, at <http://www.dnrec.state.de.us/nhp/information/CWCS.shtml> (last updated Sept. 24, 2004).

²⁸ *Id.*

²⁹ Email from Ron Vickers, Manager, Delaware Department of Natural Resources and Environmental Control - Division of Parks and Recreation - Land Preservation Office, to Roxanne Thomas, Science and Policy Analyst, Environmental Law Institute (Nov. 29, 2005, 16:47:00 EST) (on file with author).