

CHAPTER 354  
FORMERLY  
HOUSE SUBSTITUTE NO. 1  
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:

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

§ 7502. Declaration of policy.

The General Assembly finds that:

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

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

(6) It is the public policy of the State ~~and its political subdivisions~~ that the ~~preservation of open spaces~~ permanent protection of land shall be accomplished through the voluntary acquisition of interests or rights in ~~real property land~~, or donation of said lands, and that said acquisition or donation constitutes a public purpose for which public funds have been expended or advanced and should be continued.

§ 7503. Purpose.

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

- (1) To protect and conserve all forms of natural and cultural ~~resources;~~ resources.
- (2) To protect and conserve the biological diversity of plants and animals and their ~~habitat;~~ habitat.
- (3) To protect or expand existing or planned parks, forests, wildlife areas, nature preserves or other recreation, ~~conservation~~ conservation, or cultural ~~sites by controlling the use of contiguous or nearby lands;~~ sites.
- (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" or adopt regulations to restrict or otherwise control the development of land that is privately held and that may be eligible for permanent protection under this chapter to carry out the ~~provisions~~ purposes of this chapter. Participation in the Open Space Program and all transactions to permanently protect land under this chapter shall be voluntary.

§ 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~~ As used in this chapter:

(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 that contains at least 1 of the following:

a. Archaeological resources.

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

~~(4) "Interest in real property" means any right in real property, improvements thereto, or water including but not limited to a fee simple, easement, remainder, future interest, lease, license or covenant of any sort, option or contractual interest or right concerning the use of or power to transfer property.~~

(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" or "open space land" 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~~ land the permanent protection of which will further 1 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 purposes of this chapter.

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

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

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

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

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

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

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

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

§ 7505. Delaware Open Space Council.

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

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

~~(5)~~ (b) The Secretaries of the Departments 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~~ designees appointed by the respective Secretary, Director, or Officer, who shall be ex officio ~~members of~~ advisors to the Council without voting powers.

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

(e) Members of the Council shall receive no compensation but may be reimbursed for their actual and necessary expenses incurred in the performance of their official duties. ~~The Council shall hold at least 1 regular meeting in each quarter of each calendar year and shall keep a record of its proceedings. All proceedings of the Council shall be conducted in accordance with Chapter 100 of Title 29.~~

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

(g) The Council may adopt procedural rules ~~and regulations~~ to carry out ~~the provisions of its functions~~ under this chapter.

(h) The Council shall hold at least 1 regularly-scheduled public meeting in each quarter of each calendar year and keep a record of its proceedings. At regularly-scheduled meetings, the Council shall conduct its affairs, review land that the State agencies bring before it for permanent protection, and make recommendations to the Secretary. Council shall conduct its proceedings in accordance with Chapter 100 of Title 29.

§ 7506. Powers and duties of the Council.

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

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

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

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

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

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

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

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

~~(8) (3) Promote and assist, in~~ Develop, in conjunction with ~~state~~ the State agencies, ~~in the development and establishment of~~ agencies and with public input, an Open Space Program Plan ("Plan") for the Council's consideration and approval.

a. The Plan shall include the Council's and State agencies' strategies, goals, and priorities for the application of funds available for the permanent protection of land.

b. The Plan may include analysis and discussion of various creative and innovative methods to secure the permanent protection of open space land, including but not limited to:

a. 1. Local and regional land trusts; trusts.

b. 2. Conservation and preservation easements on a statewide basis; basis.

c. 3. Purchase of less than a fee simple property rights; interest in land.

d. 4. Program or programs Programs to create financial incentives for private sector contributions to establish operations and maintenance funds at state resource areas; for open space land protected under this chapter.

5. An analysis, in conjunction with all appropriate public and private conservation entities, of the best practices for fee simple and conservation easement options for protecting forest and freshwater wetland habitats and other land eligible for permanent protection.

c. The Council and State agencies shall review the Plan every 5 years and may update the Plan as necessary.

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

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

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

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

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

§ 7507. State resource areas.

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

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

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

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

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

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

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

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

§ 7507A. Open space: criteria, evaluation, and permanent protection.

(a) To be eligible for permanent protection, an area of land must include or exhibit, in whole or in part, 1 or more of the following criteria:

(1) Contains rare species, as determined by on-site verification conducted with landowner permission which is provided in writing.

(2) Has significant potential to support rare species.

(3) Is a cultural resource site or near a cultural resource site.

(4) Includes or enhances important wildlife habitat or migration corridors, or potential wildlife habitat or migration corridors.

(5) Has significant forest resources.

(6) Has wetlands, floodplains, or other lands necessary for the protection of water resources.

(7) Contains significant or unique ecosystems, natural features, or geological features.

(8) Is an inholding, contiguous to or near lands that are already preserved or protected, or planned to be preserved or protected, by federal, state, local, or other conservation agencies, groups, or entities.

(9) Provides for public outdoor recreation.

(10) Allows natural systems or plants and animals to accommodate or adapt to climate change or other large-scale changes in ecosystem processes.

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

(b) Evaluating lands being considered for permanent protection.

(1) The State agencies shall adopt, with the input of the Council and after notice and public hearing pursuant to Chapter 101 of Title 29, guidelines to evaluate land being considered for permanent protection.

(2) The State agencies may amend the guidelines, following the procedure set forth in paragraph (b)(1) of this section.

(3) The State agencies shall use the guidelines to evaluate lands that a landowner has offered for permanent protection to ensure that the land should be permanently protected and that permanently protecting the land furthers the purposes of this chapter.

(c) Protected land maps. The Department shall regularly update and make accessible to the public through electronic means maps of the land which is permanently protected in each of the 3 counties in this State.

(1) The protected land maps shall show the land protected by public entities and private land preservation organizations.

(2) The purpose of the protected land maps is to do all of the following:

a. Inform the public of the lands which are permanently protected by public entities and private land preservation organizations.

b. Guide the Council and State agencies in the review and evaluation of land for permanent protection.

c. Inform the public and guide the Council and State agencies about where the Council and State agencies should prioritize the use of funds available for the Open Space Program to further the purposes of this chapter.

(3) The Department shall highlight on the protected land maps only those areas of the State which are protected by public entities or that are conserved by private land preservation organizations. The Department may not highlight privately-owned land on a protected land map.

(d) Permanent protection of land. To permanently protect land, all of the following shall occur:

(1) The Council shall do all of the following:

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

b. Recommend to the Secretary the land that the Council determines should be permanently protected.

(2) The Secretary shall review the Council's recommendation and make a final determination whether to permanently protect the land that the Council has recommended under paragraph (d)(1)b. of this section.

§ 7507B. Access to land; limitations on use and disclosure of data.

(a) A representative of the Council or State agency may access land being considered for permanent protection to perform onsite verification to gather information about the land only after the landowner executes a written permission form granting the Council or State agency representative permission to access the land.

(b) If a representative of the Council or State agency collects data during an onsite verification of land that establishes the presence of at least 1 of the criteria listed in paragraphs 7507A(a)(1), (2), or (7) of this title during the negotiations for the permanent protection of that land, and the negotiations do not result in the permanent protection of that land, an agency or political subdivision of this State, including county and municipal governments, or person, as defined in § 302 of Title 1, may not use the data for any of the following purposes:

(1) To incorporate the data into a comprehensive plan; overlay zoning ordinance; guideline; specific or technically-based performance standard, design criterion, or mitigation requirement; or for any other restrictions on land use.

(2) To deny, delay, or recommend the denial or delay of a permit or license.

(3) To place any condition or restriction on a permit or license.

(4) To charge additional fees on a permit or license.

(c) Nothing in this chapter may be construed to prohibit the Council or State agency representative from reporting to the proper authorities any information or data obtained about the property concerning a violation of any environmental, public health, or safety laws or regulations or information that is otherwise required to be reported.

(d) Data collected under this section related to negotiations that do not result in the permanent protection of land are not public records and may not be disclosed under Chapter 100, Title 29.

§ 7508. Land-use requirements.

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

~~(1) The establishment of frontage, building height, setback and site design requirements that shall apply in state resource areas and which may apply to lands immediately adjacent thereto, which will result in residential, commercial and industrial or other uses which minimize the loss of open space and associated values of state resource area lands.~~

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

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

~~subsection shall not apply to lands producing agricultural commodities as defined in Chapter 7 of Title 3 or lands under state agency ownership.~~

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

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

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

§ 7509. Program administration.

~~(a) The Department shall administer the conservation program described in this chapter Open Space Program. The Department shall develop, periodically review and maintain a comprehensive statewide outdoor recreation and conservation plan, for consideration and approval by the Council, which shall establish criteria and priorities for the application of funds available for the purposes of this chapter. The Department's existing statewide comprehensive outdoor recreation plan shall be the initial plan for the purposes of this subsection. Direct costs associated with the administration of the Open Space Program shall be paid from the Conservation Trust Fund.~~

~~(b) The Department, in conjunction with other public and private land management organizations, shall undertake a special program to acquire or otherwise permanently protect lands within established state resource areas and other lands identified as having state significance according to the procedures of this chapter.~~

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

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

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

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

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

Section 2. Land may continue to be permanently protected under the Open Space Program's Property Ranking Process, which the Open Space Council adopted in and has used since December 2011, until the guidelines required in § 7507A(b) of Title 7 are adopted or June 1, 2017, whichever occurs first.

Approved August 03, 2016