

**THE DELAWARE AGRICULTURAL LANDS PRESERVATION
FOUNDATION**

**REPORT
OF HEARING OFFICER
REGARDING PROPOSED AGRICULTURAL LANDS
PRESERVATION PROGRAM REGULATIONS**

DATED: October 22, 2015

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INTRODUCTION

Pursuant to its statutory authority, the Delaware Agricultural Lands Preservation Foundation (the “Foundation”) has proposed for adoption a comprehensive set of regulations (the “Proposed Regulations”) to be used in the administration of the Delaware Agricultural Lands Preservation Program established pursuant to 3 Del. C. §901 (the “Program”). The Foundation conducted a public comment session on Wednesday, September 23, 2015. Notice of the public comment session was published in both the *Delaware State News* and the *News Journal* on August 18, 2015. (Ex. 1 and 2, respectively) I was requested to act as the Hearing Officer to preside over the public comment session for the purpose of receiving comments from the public on the Proposed Regulations.

A copy of the notice of the public comment session, together with notice of the Proposed Regulations, was also published in the September 1, 2015 Delaware Register. (Ex. 3) In this notice, a link was provided to a copy of the Proposed Regulations, as well as the existing regulations that would be replaced by the Proposed Regulations. Notice of the public comment session, together with a copy of the Proposed Regulations, was also published on the Delaware.gov web site on August 25, 2015. (Ex. 32) Before submitting the Proposed Regulations for public comment, the Foundation sought input from Farmland Preservation Advisory Boards, as required by 3 Del. C. §906(c). (As to Sussex County, *see* Ex. 7 and 8; as to Kent County, *see* Ex. 9 and 10; as to New Castle County, *see* Ex. 5, 6, 17, 18, and 19.) While no input was provided by Sussex County, input was received from Eric Buckson, Kent County Commissioner and Joseph Jackewicz, both on behalf of the Kent County Farmland Preservation Advisory Board. (Ex. 11 and 12) Regarding New Castle County, on September 21, 2015, the Foundation received a letter from William E. Powers, a member of New Castle County Council,

suggesting that he should have received notice of the Proposed Regulations sixty days in advance, presumably based on 3 Del. C. §906(c). (Ex. 15) However, as early as December 2, 2014, the Foundation sought information from Dr. Christopher Bullock, President of New Castle County Council, as to the status of New Castle County's Advisory Board and membership. (Ex. 17) A follow up letter was sent on March 11, 2015. (Ex. 18) On April 17, 2015, the Foundation sent an additional follow up letter to President Bullock, enclosing a copy of the Proposed Regulations and providing a brief description of some of the reasons for the proposed changes. (Ex. 5) Another follow up letter, also enclosing the Proposed Regulations, was sent on June 17, 2015. (Ex. 6) New Castle County did not ignore these requests. By email dated December 3, 2014, Anthony deFiore, Legislative Aide to Council President Bullock, informed the Foundation that he was trying to identify the current members of the New Castle County Farmland Preservation Advisory Board. (Ex. 19, page 3) In a follow up email on December 8, 2014, Mr. deFiore advised that "Our office is responsible for all Council board appointments and we had no idea this board even existed until last week ... I'll do some research and let you know what I come up with." (Ex. 19, page 2) There is no indication that the Foundation was provided with any additional information as to the status of New Castle County's Farmland Advisory Board in response to the Foundation's numerous requests for this information. Accordingly, it is reasonable to conclude that New Castle County did not have a Farmland Advisory Board in place. Mr. Carter provides further support for this conclusion in his October 12, 2015 comments. (Ex. 30, page 2) Indeed, Mr. Carter suggests that Mr. Powers acknowledged that the County has not properly established a Farmland Advisory Board. The Foundation cannot seek input from a Board that does not exist. Accordingly, Mr. Powers claim that he was entitled to 60 days advance notice of the Proposed Regulations is erroneous.

Comments were submitted at the September 23, 2015 public comment session. As the Hearing Officer, I presided over the comment session. E. Austin Short attended on behalf of the Foundation's staff, and provided a brief history of the Foundation's program, the number of acres preserved to date, and background information regarding the Proposed Regulations.

While several members of the public appeared at the hearing, 12 individuals provided comments: David Carter, Bob Garey, John Flaherty, Brenna Goggin, Kate Hackett, Andy Manus, Bill Powers, Stewart Ramsey, Peggy Schultz, Fred Stites, Thomas Unruh, and Christine Whitehead. At the conclusion of this session, the record remained open until October 12, 2015, more than 15 days after the conclusion of the public comment session, for purposes of receiving written comments.¹ The public and written comments are discussed below.

Based on the foregoing, I believe that all of the statutory requirements for adopting regulations relating to notice, hearing, and opportunity to comment, have been complied with by the Foundation.

THE PROPOSED REGULATIONS

The Proposed Regulations (Ex. 1) contain 22 sections, discussed below.

Section 1 sets forth the statutory requirements for district eligibility and are consistent with the Foundation's enabling statute.

Section 2 sets forth the application procedures that will be followed when a farmer requests that his/her property be included in a district. Unlike the existing regulations, the application and related forms are not included as part of the regulations. Section 2 recognizes the voluntary nature of the program. See Section 2.1.

¹ The deadline for submitting written comments was October 12, 2015. New Castle County Council requested a further extension until November 1, 2015 (Ex. 26). That request was denied for the reasons set forth in Ex. 27.

Section 3 sets forth the procedures that will be followed in reviewing applications and provides a detailed process for evaluating and dealing with any disputes. Section 3.11 would update the regulations so as to conform to the statutory changes enacted in 2004 relating in part to residential use and permitted activities. Under Senate Bill No. 333, the restrictions on individuals who could occupy dwellings on district property are eliminated and the number of dwellings, subject to certain exceptions, is limited to three (3). Parties to district agreements and preservation easements that were entered into prior to the change in law are given the option to come in under the new legislation. Section 3.11.1 and 3.11.2 set forth the process to be followed in order to make this voluntary election.

Section 4 sets forth the formal requirements to be followed in order to create a district and is consistent with the relevant statutory requirements.

Section 5 sets forth the restrictions applicable to district and preserved farmland. The restrictions are for the most part statutory. Section 5.3 provides that in calculating the permissible residential acreage, fractions will not be allowed. This is consistent with the Foundation's current practice. Section 5.9 would require written notice to the Foundation of any proposed transfer of a farm. The purpose of this notice is to provide the Foundation with adequate time to prepare the acknowledgement required by 3 Del. C. §909(a)(2)c.

Section 6.0 sets forth the statutory requirements relating to the duration of a district agreement. As provided by statute, if a farmer does not notify the Foundation in writing at least 6 months prior to the end of the initial term or any renewal term of the district agreement, the district agreement will be renewed for an additional term of five (5) years.

Section 7.0 sets forth the statutory provisions relating to expansion of a district, and facilitates bringing farms that are less than 200 acres into a district.

Section 8.0 sets forth the statutory provisions relating to inspection of district property and enforcement.

Section 9.0 sets forth the procedural requirements for hardship exceptions. It should be noted that prior to the changes implemented in 2004, there were limitations on who could reside in the dwellings located on district or preserved property. As a result, if a farmer wanted to sell a dwelling to an unrelated party, the farmer would have to apply for a hardship exception and request permission to remove the dwelling from the district/easement. If approved, with respect to preserved land, the farmer would have to make a payment to the Foundation. The need for a hardship has been reduced as a result of the changes made in the 2004 legislation. However, for those farms that have not elected to come under the new legislation, Section 9.0 sets forth the process to be followed when a hardship is sought.

Section 10 and Section 11 relate to the Delaware Farmland Preservation Fund and potential sources of Funding, and are consistent with the current regulations.

Section 12 provides that the eligibility criteria for the acquisition of a preservation easement are the same as the criteria for district eligibility, that the purchase of a preservation easement is discretionary, and that the Foundation can purchase a preservation easement on part of a property included within a District Agreement.

Section 13.0 relates to matching contributions to the program. Consistent with the current regulations, an entity providing matching funding may select “qualified” property for purchase of an easement, without regard to the other selection criteria (such as the amount of discount offered) set forth in the regulations. This provision has been used successfully in the past when a county provides funding to the Foundation for purchase of an easement on a particular farm.

Section 14.0 articulates the current practice followed by the Foundation of selecting properties for easement purchases. Typically, the decision process takes place once a year. Each year is considered a separate “Round.” As of the date hereof, the Foundation has successfully concluded 19 Rounds. Section 14.3 provides for appraisals of each property under consideration, the receipt of offers to sell an easement, followed by the execution of an option agreement and completion of a survey. Consistent with the statute, Section 14.7 confirms that the Foundation is under no obligation to purchase a preservation easement which is offered for sale. Thus, enrollment in the program is voluntary on the part of the farmer, and the purchase of an easement is, from a statutory point of view, discretionary on the part of the Foundation.

Section 15 requires the submission of an application by the farmer for each farmland tract offered for “Preservation Easement purchase.” Section 15.2 requires the Foundation to develop and make available the application form, and upon receipt, review the application for completeness.

Under Section 16, for each Round, all eligible properties would be appraised pursuant to the appraisal process described therein. The requirements of the appraiser are set forth in Section 16.3.2. The appraiser is directed to determine the full market value of the land under its agricultural zoning designation, as well as the agriculture-only value. The latter, consistent with current practice, is required to be based on “an income capitalization methodology.” Section 16.01. The value of buildings and other improvements on the farmland is excluded, as is the value of the acreage designated by the owner for residential purposes.

Section 17 sets forth the procedure for determination of the Preservation Easement Value, which is consistent with the Foundation’s existing practice. If an applicant disagrees with the appraisal, Section 17.3 provides a mechanism by which the applicant can obtain an alternative

appraisal, which can result in an adjustment to the Foundation's initial appraisal. The price paid by the Foundation for the purchase of an easement, by statute, cannot exceed the value of the easement.

Regarding Section 18, by statute, the Foundation is authorized to incorporate bidding and/or negotiation as part of the easement procurement process. 3 Del. C. §915. Section 18 incorporates such a bidding process. Consistent with past practice, Section 18 provides for (subject to consideration of any alternative criteria by the Foundation to satisfy special objectives) the selection of those offers providing the "highest level of percentage donation or percentage discount to the finally appraised value of the Preservation Easement ...". Such an objective process has worked well in the past. As noted by Austin Short in his public comments, historically, the Foundation has been able to purchase preservation easements in all three counties at an average discount of 56%. Traditionally, properties located near growth zones have commanded a higher preservation easement value, thus providing owners of farmland located near growth zones an advantage. Under the Proposed Regulations, additional incentives would be provided by increasing the percentage discount by 5% for the sole purpose of ranking an application for property located within one-half mile of a growth zone. This 5% bonus would increase the chances of that property being selected for easement purchase, without reducing the purchase price by 5%. See Section 18.2. It is contemplated that each county would designate its respective growth zone. The 5% bonus would apply to any farms that are located "in whole or in part within one-half (1/2) mile completely outside of any growth zone of the county in which the property is located, or in whole or in part within one-half (1/2) mile completely outside of the boundary of an incorporated town, municipality, or city" (for ease of reference, hereinafter referred to as the "Bonus Area").

Section 19 sets forth in general terms requirements relating to the documentation regarding the preservation easement, the legal description requirements, the survey, and the need for the owner to designate on the survey any residential lots.

Section 20 sets forth the title requirements and post-closing adjustments required if a survey turns out to be inaccurate.

Section 21 relates to the designation of residential lots contemplated by Senate Bill 333. As noted above, as a general rule, the farmer is allowed to designate up to three residential lots and have up to three dwellings on the farm, with no limitation on who can reside in the dwellings. Section 21.1 cautions farmers not to rely upon Foundation approval of a residential lot in lieu of ascertaining that the lot complies with local zoning requirements. Owners are encouraged to make certain that any designated residential lot will be suitable for a dwelling. Section 21.2 addresses the procedures to be followed if an owner wants to change the location of a residential lot. The owner must obtain, and pay for, an amended plot plan to reflect the change. This is consistent with the current practice.

Finally, Section 22 refers to a Strategy Map attached as Appendix B to the Proposed Regulations which identifies those farms which have a LESA Score of at least 170 and thus targeted for inclusion in districts, as well as those farms located in the Bonus Area that are eligible for the 5% discount bonus described in Section 18.2 of the Proposed Regulations.

SUMMARY OF ORAL COMMENTS SUBMITTED AT THE HEARING

As noted above, 12 individuals spoke at the public comment session. A brief summary of the relevant comments is set forth below.

David Carter. Mr. Carter is the President of the Delaware Audubon Society and an individual participant in the preservation program. He stated that the Delaware Audubon Society

authorized him to express its strong support for the Proposed Regulations, including the 5% incentive for properties located within the Bonus Area. (Tr. 22-23²) He expressed his belief that the percentage of land currently in the program in the “five percent buffer” is slightly higher than the County averages, leading him to believe that “the prioritization process in place by market forces is already working well...” (Tr. 23-24) He expressed his disagreement with those who claim that the preservation program is not effective in New Castle County and places New Castle County farms at a disadvantage due to the discounting method. (Tr. 24-25) He noted that under the current program, 20% of the available farmland in New Castle County is covered by a preservation easement, compared to 15% in Sussex County. (Tr. 25) Mr. Carter also noted some of what he considered to be the advantages of the current discounting method. He noted it promotes transparency and “eliminated gaming of the process by special interests or influential landowners that have political connections” and promotes “landowner confidence and trust in the program.” (Tr. 26) In his opinion, the discounting process results in the selection of “those farmers and landowners most devoted to the future of agriculture and ...land resources.” (Tr. 27) Mr. Carter noted that he sold a preservation easement on his New Castle County farm based on a 48% discount. (Tr. 28-29) Mr. Carter stated that his farm was in a “very high pressure development zone in southern New Castle County” and as a result of development near his farm, his farm value increased by “300 percent.” As a result of this appreciation, Mr. Carter believed that it gave him an “incredible advantage to be able to bid because the amount of money that I was able to get at a discount rate was much higher.” (Tr. 29)

Bob Garey. Mr. Garey, Chairperson of the Foundation’s Board of Trustees, noted the support the program has received in the past from farmers and landowners, legislators, and the

² At the conclusion of the public comment session, a verbatim transcript of the public comments, consisting of 73 pages, was prepared. References to the transcript and page number are referred to herein as “Tr.-__”.

federal government. (Tr. 31-32) He expressed his belief that the program is equitable and noted the Foundation's willingness to make adjustments to the program when and as needed. (Tr. 32)

John Flaherty. Mr. Flaherty had no comments about the Proposed Regulations, but did inquire about access to the Foundation's audit report. I directed him to Austin Short.

G. Brenna Goggin. Ms. Goggin spoke on behalf of the Delaware Nature Society. She noted that organization's long history of supporting the preservation program, and observed that the "Department of Agriculture runs a first rate precedent-setting program for the rest of the country..." (Tr. 35) She expressed the Society's support for the Proposed Regulations. (Tr. 35)

Kate Hackett. Ms. Hackett spoke on behalf of the Delaware Wild Lands. Ms. Hackett, the Executive Director of that organization, expressed strong support for the Delaware program and the Proposed Regulations. (Tr. 37) She noted that the Delaware preservation program is "more successful than other land protection programs throughout this State and the region...and ...has substantially lower cost than other land protection programs." (Tr. 37) She noted that the program has "protected ...more acres of agricultural land per capita than any other state in the country." (Tr. 38) She also noted that the program is a voluntary program that has protected land at an average cost of less than \$2,000 per acre. (Tr. 38) She urged continued support by the State of the program to ensure (a) the long-term viability of the agricultural industry and (b) the Foundation's ability to leverage non-state sources of funding for the protection of one of Delaware's largest industries. (Tr. 40)

Andy Manus. Mr. Manus noted that prior to his retirement, he worked in the area of land conservation for 38 years and was involved in "over half a billion acres being preserved in North America." (Tr. 41) He stated that the Delaware program "is one of the most effective and efficient programs I have ever come into contact with." (Tr. 41) He voiced his support for the

Proposed Regulations, including Section 18.2. Regarding Section 18.2 of the Proposed Regulations, he stated that this would provide “an incentive-based opportunity for landowners to protect their farms within half mile of a County growth zone” and recommended that the Foundation track in subsequent rounds “the efficacy of this incentive in attracting new participants into the program.” (Tr. 43-44) Mr. Manus noted the economic contribution of agriculture on Delaware’s economy, contributing 7.95 billion dollars and 30,000 jobs to the economy. He stated that the Delaware Agricultural Land Preservation Program is responsible for “a proactive effort that protects productive farmland that is a key ingredient to maintaining a healthy agriculture business sector.” (Tr. 44)

Bill Powers. Mr. Powers appeared in his capacity “as a farmer.” (Tr. 45) Mr. Powers noted however that he is a County Councilman for New Castle County. He stated that the Proposed Regulations were never sent to him, and that he found out about the Proposed Regulations while reading the Delaware State News. (Tr. 45-46) He noted that he “just found out today” that the Proposed Regulations were sent to the County Council President “three or four times.” (Tr. 45) He noted that in order to review the Proposed Regulations, he “had to go through and cross out everything that you are eliminating out of your laws and go through what you are adding. And then I had to go through and work through Title 3.” (Tr. 46) He expressed his desire for the Foundation to be “consistent with the State law” and expressed his opinion that if “you pass this, you will have to change the State law.” (Tr. 46)³

³ Mr. Powers submitted a letter dated September 21, 2015 (Ex. 15) stating that the County Advisory Boards should have been given the opportunity to study the proposed regulations. In that same letter, he accused the Foundation of failing to comply with certain statutory mandates. He also requested that the record remain open for “fifty days following the hearing.” As noted above, the original October 1, 2015 deadline for comments was extended to October 12, 2015.

Stewart Ramsey. Mr. Ramsey is a farmer and President of the New Castle County Farm Bureau. (Tr. 47) He expressed his belief that “the law and the guidelines for the Foundation are fairly well aligned right now” and “present fairly clearly how things are supposed to be prioritized, how money is supposed to be spent, particularly with respect to growth zones and highly threatened areas of development.” (Tr. 48) He expressed his opinion that “we have not been nearly as successful at preserving those areas” and that he was not “convinced that New Castle County has really done that well, especially in later rounds of the program in terms of preserving farmland.” (Tr. 48) He stated that “we don’t support the changes.” (Tr. 48) He expressed his opinion that the five percent “addition to go after priority areas” is too small, and that “the amount of money that a farmer would have to give back with the types of discounts that have been in most recent rounds is huge if your ground is truly threatened.” (Tr. 49) He noted that young farmers that have recently purchased farms do not have the capital appreciation that would support a discount in the range of 60% to 70%. (Tr. 49-50) He questioned the significance of the statistic that suggests that 20% of New Castle County’s farmland is preserved, and noted that if you look at the percentage of farmland preserved in comparison to the amount of farmland that was available at the beginning of the program, “it makes New Castle County fare much worse.” (Tr. 50) He stated his opinion that since the program started in 1991, New Castle County has lost a “dramatically larger percentage of its farmland than any of the other counties.” (Tr. 50-51) He stated that “if we were to build on all of the farms that are left in New Castle County, the 20 percent becomes one hundred percent” which he would not consider “a success.” (Tr. 51)⁴

Peggy Schultz. Ms. Schultz submitted comments on behalf of the League of Women Voters of Delaware. (Tr. 51-52) She stated her opinion that the Foundation is designed to support the agricultural industry in Delaware, and that in 2009 Delaware received a commendation from

⁴ Mr. Ramsey also submitted written comments (Ex. 23) which were consistent with his oral comments.

the American Farmland Trust for being “sixth out of 21 states in the number of farm acres protected.” (Tr. 52) She noted the importance of recognizing that 80% of the funds received in exchange for the development rights “remain in the State” and are used by farmers to “buy more farmland or to buy farm equipment.” (Tr. 53) She expressed the League’s support for the five percent bonus to farmers who live within a half a mile of a growth zone. (Tr. 53) She noted that one advantage to preserving farmland is that the resulting “green space” is “much cheaper to support in terms of community services provided than if ...developed...” (Tr. 54)

Fred Stites. Mr. Stites, a farmer in New Castle County, expressed several disappointments with the Proposed Regulations and the process for comment. First, he criticized the public notice for allegedly describing the Proposed Regulations as “housekeeping measures.” (Tr. 55)⁵ Second, he criticized holding the public comment session while most of the farm community were out working. (Tr. 55) Third, he accused the Foundation of not providing him with the “requested changes” so he could review them before the public comment time, and suggested that the Foundation “refused to send us a copy of the proposed amendments to their foundation regulations.” (Tr. 56)⁶ Finally, he stated his opinion that the “five percent does not comply with the state law as it was passed in 1991, specifically with a comment that up to 25 percent of the Farmland Preservation funds are allowed to be spent in non-priority areas.” (Tr. 56) He stated “I don’t see how the changes in these regulations are going to bring [the] regulation in compliance with the state law.” (Tr. 56)

Tom Unruh. Mr. Unruh stated his support for farmland preservation, and noted he preserved his New Castle County farmland. (Tr. 58) He noted that Delaware’s program “has

⁵ The public notices never referred to the Proposed Regulations as “housekeeping measures.” See Ex. 2, 3 and 4.

⁶ I believe Mr. Stites was referring to the lack of a redlined copy of the existing regulations showing the changes. Due to the extensive nature of the changes and the formatting, a redline copy was not considered practical.

been a success” and that the biggest problem is not having enough money. (Tr. 59) Regarding criticism that the program doesn’t work in New Castle County, he stated that one of his neighbors preserved his 100 acre farm after being offered “a million and a half” by a “developer.” (Tr. 59) He stressed the importance of recognizing the voluntary nature of the program (Tr. 60) and expressed his support for the five percent “increase”, though noting that it may not be enough “for some of these guys in this real growth area.” (Tr. 60)

Christine Whitehead. Ms. Whitehead noted that her comments were her personal opinion and that she did not represent anyone. (Tr. 62) Ms. Whitehead was a former member of the New Castle County Planning Board, the Preservation Council, the Green Infrastructure Committee of Livable Delaware, and former member of the American Planning Association. She expressed her opinion that the five percent addition to the percentage discount was too little. (Tr. 63) While being “very much in favor” of the program, she expressed her opinion that “there are times when it has not been as well run as it could have been” and “somewhat defies the mandates of the General Assembly.” (Tr. 64) She expressed her pleasure at seeing the program “moving closer to what the General Assembly asked it to do”, but opined that “it is awfully late for New Castle County.” (Tr. 64) She noted that the discounts offered in the program have gone from a “relatively useful 20 or 30 percent discount all the way up to 60 percent.” (Tr. 65) She expressed two concerns with this increase. Her first concern was that some of the farmers may be underestimating their capital needs and may wind up not being able to stay in farming as a result. Second, the only farmers that can afford to give a discount that large are farmers that have inherited their lands. (Tr. 65) She expressed her opinion that young farmers don’t “stand a chance in preserving under these circumstances.” (Tr. 65) Ms. Whitehead also noted that the Proposed Regulations do not mention the “annual audit.” (Tr. 66) Regarding the language in the

Proposed Regulations that suggests that “any entity that makes a contribution ...may be allowed to select the properties in which the funding is used”, she wondered “whether or not that has been put in to try and avoid New Castle County starting its own program.” (Tr. 67) She stated that “a lot of the money that should have come back to New Castle County wound up in Kent County.” (Tr. 67) She expressed a need for the regulations to clarify the issue of whether or not an entity that provides funding can “pick out any farm that was eligible for the program.” (Tr. 68) Ms. Whitehead also stated that any appraiser used by the Foundation must be familiar with the Unified Development Code. (Tr. 68-69)

WRITTEN COMMENTS

Several written comments were submitted. To the extent necessary, I will discuss/refer to the written comments in the Discussion and Legal Analysis section set forth below. However, for the record I will note that the following written comments were submitted:

- A. June 18, 2015 Email from Eric Buckson Regarding Proposed Regulations. (Ex. 11)
- B. Undated Letter from Joseph Jackewicz, Jr., Member of Kent County Aglands Advisory Board regarding Proposed Regulations. (Ex. 12)
- C. September 18, 2015 Letter from Tony Domino. (Ex. 14)
- D. September 21, 2015 Letter from William E. Powers, Member, New Castle County Council, to Robert Garey. (Ex. 15)
- E. September 21, 2015 email from George Smiley, Member, New Castle County Council. (Ex. 16)
- F. September 22, 2015 Letter from Christine Whitehead. (Ex. 20)
- G. September 30, 2015 email from Charles P. O’Brien. (Ex. 21)
- H. September 22, 2015 Letter from Karl D. Messer. (Ex. 22)
- I. September 23, 2015 Letter from Stewart Ramsey. (Ex. 23)
- J. Undated Letter from Bill Powers to Edwin Kee (Ex. 28)
- K. October 11, 2015 Memo from Christine Whitehead (Ex. 29)
- L. October 12, 2015 Letter from David B. Carter, President of Delaware Audubon Society (Ex. 30)

DISCUSSION AND LEGAL ANALYSIS

There were several commentators at the public comment session that supported the adoption of the Proposed Regulations in their entirety. (David Carter, G. Brenna Goggin, Kate Hackett, Andy Manus, Peggy Schultz, and Tom Unruh). Others submitted written comments supporting the Proposed Regulations. Eric Buckson, Kent County Commissioner and member of the Kent County Aglands Advisory Board, expressed his support of the Proposed Regulations. (Ex. 11) Tony Domino, a farmer who owns two farms in the Port Penn New Castle County area, supported the Proposed Regulations and the discounting method currently used by the Foundation. Mr. Domino stated that “choosing the farms based on percentage discounts offered by all interested farm owners is the right way to do it, not selection based on a few high priced farms owned by some handpicked individuals based on politics as is the case with the New Castle County program.” (Ex. 14) The Staff of the Foundation support the Proposed Regulations. (Tr. 21) As noted above, several individuals submitted one or more sets of written comments. I will attempt to describe these comments in general terms, and where noted and for the convenience of the reader of this report, state my response to the comments, where appropriate.

Those that voiced opposition were concerned about the adequacy of the incentives to encourage the preservation of farms located near or adjacent to “growth zones”, and in particular farms located in New Castle County. As noted by Austin Short in his initial presentation, under existing guidelines farms located near areas of growth are, as a result of the appraisal process used by the Foundation, given an advantage over farms located in other areas. The appraisal process results in a higher valuation of the “development rights” for farms located near the growth zone. Under the Proposed Regulations, an additional incentive would be provided via the 5% bonus described above.

While the Foundation's enabling legislation provides for a "priority" in creating preservation districts and the purchase of development rights in "those areas located near and adjacent to designated growth zones", the stated purpose, policy, and intent set forth in the statute is much broader. 3 Del. C. §901. Significantly, one purpose is to "conserve, protect and encourage improvement of agricultural lands within the State for the production of food and other agricultural products." Another purpose is to "encourage, promote and protect farming as a valued occupation." Accordingly, the "priority" of creating preservation easements near growth zones does not mean that the Foundation must ignore farmlands that are not located near or adjacent to growth zones. Purchasing preservation easements on farms located near a growth zone, on a per acre basis, is expensive when compared to other farms located outside the Bonus Area. The Foundation has limited sources of funding. If the Foundation used all of its funding to purchase easements on lands located near or adjacent to growth zones, the number of acres preserved would be much less, as would the number of farmers benefitting from the program. Preservation easements not only restrict development, but also prohibit actions which are detrimental to soil conservation or which negatively affect the continued agricultural capacity of the land. Accordingly, the purchase of preservation easements outside growth areas promote this important policy and typically result in the preservation of a greater number of acres at a reduced cost.

David Carter, in his October 12, 2015 comments (Ex. 30), noted that in New Castle County, of the farms that have been preserved to date, 24% of the preserved acreage is located within the ½ mile growth zone buffer, "consuming 27% of the Foundation funds expended in New Castle County." (Ex. 30, page 4) Mr. Carter noted what appeared to be an "inequity benefiting those within ½ mile of the growth zone ... due to the structure of the program based

on a percentage of appraised value bidding” resulting in higher land values for land adjacent to growth zones. (Ex. 30, page 4)

Concerns were also expressed about the number of farms in New Castle County that have been preserved. Initially, I would note that the Foundation’s statistics indicate that New Castle County has not been ignored. For example, to date, approximately 20% of available farmlands in New Castle County have been preserved at an average price per acre of \$2,546. (Tr. 16) This compares favorably to the average price paid to preserve farmlands in Kent and Sussex counties (\$1,499 and \$1,986 respectively). In New Castle County, 90 farms totaling 13,300 acres of farmland have been preserved at a cost of \$34 million dollars. (Tr. 16) A total of 14 farms located within the proposed Bonus Area in New Castle County and totaling 3,130 acres have been preserved. (Tr. 20) There is nothing in the Foundation’s enabling legislation that requires that the Foundation’s limited financial resources be allocated equally to each county. Indeed, participation in the program is voluntary, and accordingly, the Foundation cannot dictate what farmers in each county elect to participate. Moreover, each county has the ability to contribute funds to the program and designate which of the farms eligible for preservation easement purchase are to be preserved with those funds.⁷ The decision as to which of the eligible farms will be preserved is for the county to make, irrespective of the amount of the discount offered by the landowner. As noted by Mr. Carter, during the past several years, New Castle County has provided \$1,567,800 to the Foundation which allowed for the purchase of easements on 1,617 acres of farmland in New Castle County at an average cost of \$3,691 per acre. (Ex. 30, page 8)⁸

⁷ In order to qualify for sale of a preservation easement, under the Foundation’s program, the property must be subject to what is referred to as a 10 Year District Agreement. See 3 Del. C. § 913(a).

⁸ In total, New Castle County has contributed \$6,138,988.70 that was used to preserve 37 farms selected by the County totaling 4,033 acres. (Ex. 31)

These preservation easements were placed on farms selected by New Castle County based on the County's selection criteria, as opposed to the discounting process.

A concern was also expressed regarding the "discounts" that have been required in order to be selected for easement purchase. However, the use of discounting for purposes of easement selection is authorized by statute. 3 Del. C. §914(b)(3) and §915. Participation in the program is voluntary. Moreover, the bidding process and subsequent discounting provides an *objective* method for allocating limited funds, without interference from the political process. Despite an average discount of 56% (Tr. 16), there has been no shortage of farmers willing to participate in the program. Ms. Whitehead expressed concern that young farmers would not be able to take advantage of the program due to the discounting process. (Tr. 65) While this is just speculation, I would note that the Foundation administers a Farmland Purchase and Preservation Loan Program that facilitates the acquisition of farmland by young farmers by providing young farmers with interest free loans with liberal payment terms. 3 Del. C. §942.

Detailed comments were provided by Christine Whitehead, both at the public comment session and in writing. (Ex. 20 and 29) Regarding her written comments, Ms. Whitehead expresses concern about the apparent lack of notice to the New Castle County advisory board. This issue has been addressed above.

Ms. Whitehead suggests that in Section 1.1.5, the deletion of the weighing system for arriving at the LESA score is not acceptable. (Ex. 29, page 2) This, however, is not required by statute. The minimum LESA score is set forth in Section 1.3 of the Proposed Regulations. Under 3 Del.C. §908(a)(3), the Foundation is authorized to set the minimum LESA scoring requirements by regulation.

In her supplemental comments, Ms. Whitehead expresses concern over the removal of the application forms from the Proposed Regulations. (Ex. 29, page 2-3) Including application forms as a part of the regulations can be problematic in that changes to the forms could require going through the regulatory process. I believe that the Foundation has the expertise to make available to the public up to date application forms for use in the administration of the program.

Ms. Whitehead discusses what she considers to be an inconsistency between proposed Rule 3.3 and 12.1. (Ex. 20, page 3) There is no inconsistency. Rule 3.3 relates to the District Agreement application whereas Rule 12.1 relates to easement purchases. Rule 12.1 merely gives the Foundation the right to acquire a preservation easement on a part of a farm. Ms. Whitehead states that this should be “the choice of the owner.” As noted, participation in the program is voluntary. At times, the Foundation, due to funding limitations, does not have adequate funds to purchase an easement on a large farm. Rule 12.1 provides the flexibility to purchase an easement on part of a farm. The Foundation cannot force a farmer to do anything. Whatever choice is made, it is made with the consent of both parties to the transaction.

Ms. Whitehead criticizes Section 3.5 of the Proposed Regulations for failing to require the Foundation to submit the “criteria they used in creating a District to the local Advisory Boards...” (Ex. 29, page 3) However, the minimum eligibility requirements are set forth in Section 1.0, and by statute, the only requirement is that the Foundation submit the application to the Advisory Boards. 3 Del. C. §906(d) and §907(b). If an Advisory Board needs more detail, the Board can request that detail from the Foundation Staff.

Ms. Whitehead made some general observations regarding Proposed Rule 4.0 which relates to the creation of a District. (Ex. 29, page 3) She suggests, without stating a reason, that

the current language (Existing Regulation 9.0) be retained. I would note that the language in Proposed Rule 4.0 is for the most part identical to Existing Regulation 9.0.

Ms. Whitehead made some general observation regarding Proposed Rule 5.2, but concludes that “I think the Legislature agreed to them, so any criticism is pointless.” (Ex. 29, page 3) I agree.

In supplemental comments, Ms. Whitehead expressed concern about what she described as “harsh penalties” for any owner of District Property who fails to send 6 month notice of intent to withdraw. (Ex. 29, page 3) She suggests that a “waiver” should be allowed due to “impossible circumstances.” However, I would note that the 6 month notice provision described in Section 6.0 of the Proposed Regulation is statutory, and provides no basis for a waiver. 3 Del. C. §909(b)

Ms. Whitehead questions the fairness of Proposed Rule 9.6.3. This rule relates to the procedures for allowing a farmer to remove part of preserved property from the terms of the easement based on a “hardship.” Proposed Rule 9.6.3, regardless of any perceived unfairness, is mandated by statute. See 3 Del. C. §909(a)(2)(b)(4).

Ms. Whitehead expressed concern as to whether or not the “auditors” would be allowed access to confidential information submitted by applicant’s for a hardship. (Ex.29, page 4) The Proposed Regulations would not prevent an auditor of the Foundation from having access to Foundation records.

Ms. Whitehead expressed a “hope” that the Foundation was able to “keep up payments” under installment easement purchases. (Ex. 20, page 3) While the Foundation is authorized to fund easements by using installment payments, since inception, the Foundation has never done so.

Ms. Whitehead expressed concern that the Proposed Regulations do not mention the “Annual Audit” (Ex. 20, page 1) and that the Proposed Regulations should specifically require that the audit be made a part of the annual report. (Ex. 29, page 4) There is no need to. The audit requirement is statutory, and set forth in 3 Del. C. §904(a)(8). Moreover, proposed Rule 11.3 requires that the Farmland Preservation Fund “is subject to an annual audit to be prepared by an independent, certified public accountant.”

Ms. Whitehead criticizes “new Rule 23.3.” (Ex. 20, page 2) There is no “new Rule 23.3.” Ms. Whitehead suggests that the word “may” in proposed Rule 13.0 be changed to “shall.” (Ex. 20, page 3-4) Proposed Rule 13.0 in part documents the Foundation’s practice of allowing counties that agree to provide separate funding for easement acquisitions to actually select, from a list of qualified properties, those properties from whom a preservation easement will be purchased with County funds “notwithstanding provisions of these regulations regarding selections.” The properties available are limited to properties subject to district agreements, because only district agreement farms qualify for easement purchase. See 3 Del. C. §913(a). If a county wants to purchase preservation easement on property *not* subject to a district agreement, the county is free to do so on its own. Apparently, New Castle County has done so in the past and is in the process of doing that, at a price per acre well above that paid by the Foundation. (Ex. 30, page 8). However, if a county wants to take advantage of the administrative expertise of the Foundation, the county must select a farm that is part of a district. Either way, each county that elects to provide funding can pick the farms it wishes to have preserved, for whatever reason (political or otherwise) it chooses, including preserving farms located within the county’s designated growth area, if any. Proposed Rule 13.0 makes it clear that the Foundation has discretion, but is not required to match contributions. This practice was of course not intended to

prevent a County from adopting its own land preservation program, as suggested by Ms. Whitehead. This practice has been in effect for years, and of course, has apparently not discouraged New Castle County from promulgating its own farmland preservation program.

Ms. Whitehead makes some general observations regarding Proposed Rules 12.0 and 14.0 relating to the criteria for the purchase of easements and easement purchase procedures. (Ex. 29, page 4) However, no specific recommendations are made.

Ms. Whitehead objects to Proposed Rule 15 because it does not specify the exact information that must be submitted in an application. (Ex. 29, page 4-5) Proposed Rule 15.2 would authorize the Foundation to develop an application form for use in offers to sell easements. I would note that providing the Foundation Staff with flexibility in terms of what must be included within the application form would eliminate any need to amend the regulations every time a change in the form is deemed appropriate by the Foundation.

Ms. Whitehead inquired about the reason Rule 16.1 requires the use of “an income capitalization methodology” for determining the “agricultural only” value of farmland. (Ex. 20, page 3) In her October 11, 2015 memo, she states that “the income capitalization method should not be the only method” (Ex. 29, page 7) and “appraisals should measure up to federal standards. (Ex. 29, page 6) Mr. Powers, in his supplemental comments (Ex. 28) opines that this method is “antiquated, inaccurate, and ...reflects a highly over-inflated easement value.” (Ex. 28, page 2) The Foundation has been using this methodology for quite some time. It has the advantage of consistency, and is applied *uniformly* to all landowners submitting offers to the Foundation. Mr. Powers suggests that this method does not comply with 3 Del. C. §916. (Ex. 28, page 2) Under that section, the agriculture value of land is defined as “the price as of the valuation date which a vendor, willing but not obligated to buy, would pay for the property as a *farm unit*, to be used for

agricultural purposes.” (emphasis added). The income method is but one method of determining value. I do not believe that Section 916 precludes the use of that methodology, when applied in a uniform and consistent manner to all applicants. Mr. Powers also states that because this methodology is not accepted by the Federal Government for matching funds, it discriminates against those farms whose property qualifies under the Federal program and deflates their easement value when compared to the others in competition for State bidding. (Ex. 28, page 2) In reality, it does not. While it is true that the “income method” cannot be used for determining the amount of federal funds that will be contributed by the United States toward the purchase of the easement, the “income method” is nevertheless used by the Foundation for purposes of determining the amount that the Foundation will actually pay for the purchase of the easement that, because of the size of the discount, has been selected for purchase. Accordingly, the amount actually received by the farmer is still based on the “income method” valuation.

Regarding Rule 16.2, Ms. Whitehead inquires as to “what point the dwelling area (s) go from excluded to eligible to get a waiver and be included.” (Ex. 20, page 3) A farmer who sells a preservation easement is entitled, as a general rule, to designate up to three residential areas. The amount of residential acreage is limited to 1 acre for every 20 acres of usable farm land, up to a maximum of 10 acres. 3 Del. C. §909. The acreage allocated to the residential areas is excluded from the valuation of the easement for purposes of determining the amount paid to the farmer. This does not mean that the residential acreage will not be a part of the easement. However, some landowners have requested to in effect waive, up front, all or a portion of the allowed residential acreage. This results in the farmer receiving additional compensation. The waiver takes place at the time of the easement purchase, and is noted in the preservation easement signed at closing.

Ms. Whitehead suggests that more detail be included in Proposed Regulation 16.3 regarding the qualifications of any appraiser used by the Foundation. (Ex. 29, page 6) For example, she suggests that the regulations specifically require that appraisals be done by an appraiser who is familiar with the laws of the jurisdiction in which an appraisal is done. (Ex. 29, page 6) Proposed Regulation 16.3 would require that an appraiser be “an independent, licensed real estate appraiser who is qualified to appraise a property for easement purchase” and that the appraiser be “selected on the basis of experience, expertise and professional designation.” The appraiser must also be a member of an organization which subscribes to the “Uniform Standards of Professional Appraisal Practice” and follow that organization’s ethical and professional standards.

Ms. Whitehead suggests that proposed Rule 16.3 should include a provision that “no contract professional working for the Foundation may be related to the farmers applying for preservation or the staff of the Department of Agriculture or the Members of the Board.” (Ex. 20, page 3) I would note that under the Proposed Regulations, the appraiser must be “an *independent*, licensed real estate appraiser who is *qualified* to appraise a property for easement purchase.” Ms. Whitehead also objects to the removal of the provisions of current regulation 26.0 which specifies the information that an appraiser must provide regarding “comparable sales.” (Ex. 29, page 6-7) The Proposed Regulation does not attempt to micromanage what information must be contained in an appraisal report.

Ms. Whitehead criticizes proposed Rule 17.4.1 which sets forth the methodology for determining the value of a preservation easement when the farmer disagrees with the Foundation’s appraisal. (Ex. 20, page 3; Ex. 29, page 7) Under such circumstances, the farmer can obtain his/her own appraisal, and Rule 17.4.1 sets forth an objective formula for determining

the value. Ms. Whitehead suggests that the better approach would be for the Board to determine value on a case by case basis, and be required to “choose one or the other.” (Ex. 29, page 7) However, the objective approach set forth in the Proposed Regulations provides a practical way of dealing with the issue. More importantly, as noted in 3 Del. C. §916(b), if the owner and the Foundation do not agree on the value, the owner is entitled to withdraw the application for conveyance, without prejudice to any submission of an application in the future. Participation in the program is voluntary, and if a farmer is not willing to accept the valuation that results from Rule 17.4.1, the farmer does not have to sell the development rights. The methodology provided for in Rule 17.4.1 provides a consistent approach.

Ms. Whitehead expressed concern about the confidentiality provisions of proposed Rule 18.4, and in particular, the confidentiality of the amount of discount that a farmer agrees to accept. (Ex. 20 page 1-2 and Ex. 29) Mr. Powers, in his supplemental comments (Ex. 28), expressed similar concerns. I would note that the Foundation does disclose the average discount percentages. More importantly, the Proposed Regulation is consistent with Delaware’s Freedom of Information Act which excludes from the definition of a public record “any records which disclose the identity of the contributor of a bona fide and lawful charitable contribution to the public body whenever public anonymity has been requested ... by the contributor.” 29 Del. C. §10002(g)(7).

Ms. Whitehead objects to *deleting* the provisions of *current* Regulation 18, 23, and 24 which provide a complicated methodology that ranks agricultural land and attempts to prioritize the type of farms that should be preserved. (Ex. 29, page 5-6) One of the purposes of the Proposed Regulations is to simplify the easement acquisition process. The Proposed Regulation would eliminate the complex methodology and substitute a uniform and objective basis for

selecting farms to be preserved. Several speakers and commentators praised the use of discounting. Several commentators supported the proposed 5% bonus for farms located in the Bonus Area. As a condition to participating in the bidding process, each farm must be a part of a District. Before becoming part of a District, the farm must satisfy the criteria set forth in Proposed Regulation 1.0, as well as the statutory provisions set forth in 3 Del. C. §908. Under the Proposed Regulations, all farms that are part of a District are eligible to participate in the bidding process. Indeed, under current Regulation 23.3, the Foundation reserved the right to have all eligible properties appraised and considered for purchase of preservation easements, regardless of the ranking procedures.

Regarding the 5% bonus for farms located in the Bonus Area, Ms. Whitehead questions how effective such a bonus will be. (Ex. 20 and Ex. 29, at page 7) Ms. Whitehead might or might not be correct. Others have expressed similar concerns. For example, Joseph Jackewicz, Jr, a member of the Kent County Advisory Board, questioned whether a 5% bonus would be sufficient. (Ex. 12, page 2) On the other hand, Mr. Carter, on behalf of the Delaware Audubon Society, suggest that if this proposal is adopted, the Foundation should closely monitor the impact to “ensure it does not create a lopsided structural inequality that penalizes the many farmers outside of the growth zone buffer area.” (Ex. 30, page 4-5) I would not that if the Board concludes that the 5% bonus is acceptable and it turns out to be ineffective, or for that matter, too effective, the Board can reconsider the issue at some point in the future.

Ms. Whitehead states that the requirement in Section 18.2 of the Proposed Regulations that would require the Foundation to select those offers providing the highest level of discount is not permitted by law. (Ex. 29, page 7) Initially, I would note that under Proposed Regulation 18.2, the Foundation’s obligation to select farms that offer the highest discount is “subject to

consideration of any alternative criteria by the Foundation to satisfy special objectives.” Proposed Regulation 18.2. Regarding the legality of the proposed method, I will discuss that in detail below.

Finally, Ms. Whitehead criticized the Strategy Map referenced in Proposed Regulation 22. As the Proposed Regulation states, the “Strategy Map” shows those farms having a LESA score of at least 170 that are targeted for inclusion in a District, as well as those qualified farms located “in whole or in part one-half (1/2) mile completely outside of any growth zones” which will be further prioritized by the discount advantage set forth in Proposed Regulation 18.2. Ms. Whitehead takes issue with the map. However, I would not that by identifying farms that satisfy the LESA score as well as properties near and adjacent to growth zones, the Strategy Map provides the Foundation and others with valuable information for use in the administration of the program. Ms. Whitehead closed her comments with the statement that “what these Proposed Regulations represent is not an improvement in the program, nor do they seem to be necessary. Quite the contrary, so I oppose their adoption.” (Ex. 29, page 8)

Kent Messer submitted written comments on September 28, 2015. (Ex. 22) Mr. Messer is a co-Director of the USDA-funded national Center for Behavioral and Experimental Agri-Environmental Research program. Mr. Messer voiced his support of the Proposed Regulations, and noted that “DALPF is a case study of excellence that has been shared with audiences of conservation professionals in the region, in the nation, and internationally.” (Ex. 22) He notes that DALPF “has done a reasonable job at distributing the money throughout the state as it has protected 20% of the available farmland in New Castle County and 15% of the available farmland in Sussex County.” (Ex. 22) He voiced his support for the use of “voluntary discounts in a competitive reverse auction setting” and opined that this approach is a “model for

conservation everywhere.” (Ex. 22) He opined further that the program was “a good deal for farmers and a good deal for the taxpayers of Delaware”, and urged the Foundation “not to let the voices of a few motivated by self-interest undermine the benefits secured by the many in a cost-effective manner.” (Ex. 22)

As noted above, Mr. Jackewicz submitted written comments. In his comments, he noted the advantage of the current discounting process in terms of “removing any subjectivity or outside influence, political or otherwise.... (Ex. 12, page 1) He noted that the discounting system has been “recognized nationally as a success.” (Ex. 12, page 1) At the same time, he expressed concern that use of the designated growth zones could impact the objectivity of the process, since “the future locations of the zone itself is subject to influence on county and/or state planners.” (Ex. 12, page 1) I recognize that the designation of a growth zone is somewhat subjective, but someone needs to designate the growth zones and each county is in the best position to do so.

I received a written comment from Charles P. O’Brien, Esquire, who represents an individual who owns a farm subject to a preservation easement and located within a growth zone in Kent County, Delaware. (Ex. 21) He noted that the Proposed Regulations do not deal with terminating a preservation easement. Mr. O’Brien is correct, with the exception of the hardship provisions, which deal with removing a dwelling from the scope of an easement. Provisions relating to the termination of District Agreements and Preservation Easements are statutory, and accordingly, the Proposed Regulations cannot and do not alter those provisions. See 3 Del. C. §909(b) and §917.⁹

⁹ Mr. O’Brien argues that terminating a preservation easement on property located within a growth zone may be beneficial by stimulating the local economy and promoting job growth, presumably from the resulting development of the land. (Ex. 21)

On or about October 12, 2015, Mr. Powers submitted an undated letter addressed to Edwin Kee, Secretary of the Department of Agriculture. (Ex. 28) In that letter, he recommended rejecting the Proposed Regulations in their entirety. He claims that while the existing regulations are consistent with the law, the Proposed Regulations are not. He claims that the Proposed Regulations for “easement purchases criteria” do not comply with the standards set forth in Title 3-901 of the Delaware Code. He states that the Foundations “Bylaws” should be made part of the Proposed Regulations. He suggests that the Proposed Regulations should require that 75% of the Foundation’s funds be used to purchase easements on “priority areas” with the remaining 25% used to purchase easements on “non-priority areas.” Similar to Ms. Whitehead, he criticizes the use of the “income method” for determining the “agriculture only value”, and recommends that any appraisal methodology should be consistent with the appraisals “required by the Federal Government...” He questions the validity of the confidentiality provisions regarding the amount of the discount offered by a farmer, as set forth in Section 18.4 of the Proposed Regulations. (Ex. 28)

The Foundation Board, of course, must decide whether or not to adopt the Proposed Regulations. I have attempted to summarize the comments submitted, and where appropriate, state my observations as to some of the comments. Regardless of any personal opinion that I may express, the Foundation Board must (and I am sure will) make its own independent decision. Nevertheless, for the benefit of the reader, set forth below is a brief analysis of some of the legal issues relating to the Proposed Regulations.

The Foundation has the legal authority to adopt, after public hearing, criteria for establishment of Preservation Districts and criteria for the purchase of preservation easements. 3 Del. C. §904(a)(1) and (2). The Foundation has the authority to develop an effective program to

fully implement the provisions of the statute. 3 Del. C. §904(a)(11). The Foundation has the authority to adopt procedural rules to govern the manner in which internal affairs of the Foundation are conducted and to adopt rules and regulations to fulfill the Foundation's responsibilities and fully effectuate the authority, purposes, intent and activities contemplated by the statute. 3 Del. C. §904(b)(20) and (21). The Foundation has the authority to adopt a statewide preservation strategy which specifically identifies the areas of the State in which valuable productive agricultural lands are located and which are considered best suited for long-term preservation. 3 Del. C. §904(a)(3). In order to adopt the Proposed Regulations, the Foundation is required to provide the Farmland Advisory Boards (if they exist) with an opportunity to comment. In this proceeding, a public comment session was held, after proper notice, and members of the public and existing Farmland Advisory Boards were given the opportunity to submit verbal comments and written comments. Based on my review of the procedural aspect of this proceeding, I believe that the Foundation has complied with its obligations regarding notice, hearing, and opportunity to comment.

Two of the commentators criticized the removal of the Foundation's Bylaws from the Proposed Regulations. The Foundation is not required to submit for public comment rules relating to the Foundation's organizational structure, 3 Del. C. §904(b)(1), or procedural rules to govern the manner in which internal affairs of the Foundation are conducted. 3 Del. C. §904(b)(20). Under Delaware's Administrative Procedures Act, descriptions of agency organization, operations, and procedures for obtaining information, as well as rules of practice and procedure used by the agency may be adopted informally. 29 Del. C. §10113. Accordingly, it is not necessary for the Foundation to include within the Proposed Regulations any bylaws. One of the goals of the Proposed Regulations is simplicity.

Regarding the Foundation's decision in this matter, whatever that may be, I would note that the Foundation has a significant amount of discretion under its enabling statute. For example, by statute, the purchase of preservation easements by the Foundation is "purely a discretionary function" and the Foundation is under no obligation to purchase a preservation easement from any applicant. 3 Del. C. §913(a). Indeed, the Secretary of the Department of Agriculture has the right to reject any proposed acquisition of a preservation easement, or any proposed establishment or expansion of a district. 3 Del. C. §919(a). The Secretary also has the unilateral right to reject, in whole or in part, any criteria adopted by the Foundation for establishment of a District. 3 Del. C. §919(c). The Secretary, by statute, is authorized to establish and promulgate such rules and regulation as he deems necessary to enforce the state policy established under the statute. 3 Del. C. §930. Significantly, by law, the Foundation's enabling legislation and regulations promulgated thereunder are required to be construed "liberally to effectuate the legislative intent." 3 Del. C. §929.

Regarding the purchase of preservation easements, while the statute provides that the Foundation shall "consider" certain matters when reviewing applications, 3 Del. C. §914(b), when it comes to the "acquisition" of easements, 3 Del. C. §915 sets forth the statutory framework for the acquisition process. Section 915: (i) requires the Foundation to adopt a "uniform procedure for acquiring" easements, (ii) authorizes the Foundation to incorporate bidding and/or negotiation as part of the procurement process, and (iii) gives the Foundation the authority to establish "separate methods or incentives to facilitate the acquisition of ...easements in designated areas which are near or adjacent to growth zones, or border in part the growth zones." The Foundation's Proposed Regulations relating to discounting and the 5% growth zone bonus comply with Section 915 and provide a uniform procedure for acquiring easements.

Some commentators challenged the legality of the Proposed Regulations. (See Powers Letter, Ex. 28 and Whitehead Memo, Ex. 29) In my opinion, a review of the enabling statute suggests otherwise. The Proposed Regulations are consistent with the purpose, policy, and intent of Section 901 of the Act. Under 3 Del. C. §904(a)(2), the Foundation is authorized to adopt, after public hearing, criteria for the purchase of ...easements, which criteria shall supplement and be consistent with the standards set forth in this chapter.” Under 3 Del. C. §914(b), in reviewing applications for the conveyance of easements, the Foundation is required to *consider* (1) the criteria set forth in Section 908(b), (2) the relative agricultural value of the lands and potential for conversion to nonagricultural use, and (3) the relative cost of acquiring the easement, giving due consideration to the discount offered by the landowner. There is no statutory requirement that any of these factors *dictate* when and if the Foundation can purchase an easement, how each factor should be weighted, or how and when each factor should be “considered.” As noted above, in terms of acquiring an easement, Section 915 provides the Foundation with a considerable amount of flexibility. Under Section 914(c), the Foundation is authorized (but not required) to adopt a system for scoring, ranking and prioritizing applications for the conveyance of an easement, as well as a means of creating a priority for acquisition of easement in areas near growth zones. The adoption of a system for scoring, ranking and prioritizing is discretionary. However, under 3 Del. C. §915, the Foundation is directed to adopt a “uniform procedure” for the acquisition of preservation easements that “may incorporate bidding and/or negotiation as part of the procurement process”, and the Foundations is “*entitled* to establish separate methods or incentives to facilitate the acquisition of easements in designated areas near growth zones.” Regarding Section 915, the Proposed Regulations would continue the existing “discount” process, and include the additional 5% incentive for lands located near

growth zones. Accordingly, the Proposed Regulations comply with Section 915. Regarding factors to be “considered”, the discounting and growth zone incentive provisions of the Proposed Regulations relate in part to Section 914(b)(2) and 914(b)(3). Regarding Section 914(b)(1), the criteria that are to be “considered” when placing a property in a District are encompassed in the Proposed Regulations under Section 1.0. Easements are only purchased on land that has already been included in a District. There is no need for the Foundation to revisit each of the District criteria set forth in Section 908 when deciding whether to purchase an easement. Section 915 provides adequate statutory support for the easement purchase procedures set forth in the Proposed Regulations.

While some of the comments were critical of the “discounting” procedure that the Foundation has been using and would continue to use under the Proposed Regulations, “discounting” is specifically authorized by statute. See 3 Del. C. §914(b)(3) and §915. The sale of a preservation easement is a voluntary transaction. Those farmers who are not willing to provide an appropriate discount do not have to participate in the program.

Some commentators expressed concern that the Proposed Regulations do not go far enough in terms of “creating a priority” for the acquisition of easements in “designated areas which are near or adjacent to growth zones.” As noted by several commentators, farmland adjacent to growth zones has been somewhat prioritized by the fact that the valuation of such farmland, when compared to farmland located in other areas of the state, is much higher, thereby giving the owners an advantage in the competitive bidding process. Regardless of what one thinks of that approach, under the Proposed Regulations, in addition to the current advantage, farmland located within the Bonus Area would be given an additional advantage in the form of a 5% bonus for purposes of competing with other bidders. See Section 18.2 of the Proposed

Regulations. It may turn out that the 5% bonus will not be sufficient. However, I would note that impact of the bonus could be monitored by the Foundation and, if need be, adjusted by the Foundation in the future. I would also note that while the purchase of preservation easements on land located near and adjacent to growth zones is to be encouraged, one should not conclude that preserving farmland in other parts of the state should be *discouraged*. As previously noted, by statute it is “the declared policy of the State to encourage, promote, and protect farming as a valued occupation” and to “conserve, protect and encourage improvement of agricultural lands within the State for the production of food and other agricultural products.” 3 Del. C. §901. Purchasing preservation easements on farmland that is not currently located “near and adjacent to designated growth zones” is consistent with these declared policies.

Mr. Powers expressed concern over not including within the Proposed Regulations what is now a part of Section 28 of the current regulations and relates to creating two categories of “priority” and “non-priority” areas and when purchasing easements, allocating up to 75% of available funding to the “priority” areas and up to 25% to the “non-priority” areas. (Ex. 28, page 2-3) I do not believe that this process is required by statute. The Proposed Regulations do not embrace this approach. The Proposed Regulations provide for a 5% bonus for farms located in the Bonus Area, and the appraisal process provides an additional incentive for the sale of a preservation easement for property located near designated growth zones.

Concern was also expressed regarding the number of acres that have been preserved in New Castle County. However, the statistics presented during the public comment session do not suggest that New Castle County farms have been ignored. Moreover, consistent with the current practice, the Proposed Regulations would continue the process by which each County that is willing to contribute the funds required to purchase the easement, can designate those farms on

which the Foundation must purchase a preservation easement with the County funds. The only requirement of course is that the farm must be a “qualified” farm, which in effect means the farm must be subject to an existing District Agreement. Each year the Foundation, at its expense, will appraise District Agreement farms in each county, and solicit “discounts” from each farmer. If a County is willing to provide the funding, the County is free to review the list of qualified farms, and from that list, designate the farms on which a preservation easement will be purchased with the County’s funds. The County’s decision does not have to be based on the amount of the discount. It can be based on political reasons, social reasons, or the proximity of the farmland to the County’s designated growth zone, if any.

Based on my review of the comments and the Proposed Regulations, I believe that: (i) the Foundation has authority to adopt the Proposed Regulations; (ii) all of the legal procedural requirements have been complied with; (iii) the Proposed Regulations are consistent with the Foundation’s enabling statute; and (iv) the Proposed Regulations provide a uniform procedure for acquiring preservation easements and incorporate bidding into the selection process.

I would also note that many of the Proposed Regulations are of the type that could be adopted informally because they relate to the Foundation’s procedures for obtaining information and rules of practice and procedure. 29 Del. C. §10113(b)(1)-(2). Proposed Regulations 2.0, 3.1-3.10, 4.0, 8.0, 10.0, 11.0, 14.0, 15.0, 19.0, and 20.0 arguably fit within this category. Amendments to regulations to make them consistent with changes in basic law may be adopted informally. 29 Del. C. §10113(b)(5). Proposed Regulation 3.11 and 21 arguably fit within this category. Several of the Proposed Regulations are merely a restatement of the law. See for example, Proposed Regulation 6.0 and 7.0. Regardless, the Foundation has provided the Advisory Boards in each county and the public with the opportunity to comment on all of the

Proposed Regulations. The Advisory Boards of Kent County and Sussex County have not objected to the Proposed Regulations.

CONCLUSION

As noted above, the Foundation must decide whether to adopt, modify, or reject the Proposed Regulations. At this point, I would like to thank all of the persons who attended the public comment session, as well as those who submitted written comments. I have tried to address the material comments. Much of the criticism of the Proposed Regulations appear to relate to how the Foundation’s preservation program works in New Castle County.¹⁰ I would note that under 3 Del. C. §904(6) the Foundation is responsible for establishing a “program of cooperation and coordination with the governing bodies of the counties....” Under 3 Del. C. §924, “all ...political subdivisions” are authorized and “empowered to cooperate with, aid and assist the Foundation in effectuating this chapter...” In order for these goals to be achieved, the existence of a functioning Farmland Preservation Advisory Board would be helpful. Each county legislative body is required by statute to establish a Board. Unfortunately, throughout this rule making process, and contrary to one commentator’s suggestion, New Castle County did not have a functioning Advisory Board. In addition to reviewing proposed regulations, Advisory Boards have input on applications for the establishment of Preservation Districts. 3 Del. C. §906(d). Historically, while not recently, New Castle County has contributed in excess of \$6,000,000 to the program for use in the purchase of preservation easements on district property *designated* by New Castle County. The efficiencies resulting from the administrative expertise of the Foundation and discounting process, has enabled New Castle County to preserve an additional

¹⁰ I would note that in April of 2015, the Foundation provided New Castle County with a copy of the Proposed Regulations. (Ex. 5). No one with authority to speak on behalf of New Castle County has objected to the Proposed Regulations. Mr. Powers, a member of New Castle County Council, made it clear that he was appearing on behalf of himself.

4,033 acres of farmland over and above that which has been preserved with Foundation funds.

(Ex. 31)

Respectfully submitted,

(S) William A. Denman _____

William A. Denman

Hearing Officer

Exhibit List

<u>Exhibit Number</u>	<u>Exhibit Description</u>
1	Proposed Regulations
2	Delaware State News Affidavit of Publication
3	News Journal Affidavit of Publication
4	Delaware Register Notice of Hearing and Proposed Regulations
5	April 17, 2015 Letter to Hon. Chris Bullock, President, New Castle County Council
6	June 17, 2015 Letter to Hon. Chris Bullock, President of New Castle County Council
7	April 17, 2015 Letter to Hon. Michael H. Vincent, President, Sussex County Council
8	June 17, 2015 Letter to Sam Wilson, Sussex County Aglands Advisory Board
9	April 17, 2015 Letter to Eric Buckson, Commissioner, Kent County Aglands Advisory Board, et. al.
10	June 17, 2015 Letter to Eric Buckson, Commissioner, Kent County Aglands Advisory Board, et. al.
11	June 18, 2015 Email from Eric Buckson regarding proposed regulations
12	Undated Letter from Joseph Jackewicz, Jr., Member of Kent County Aglands Advisory Board regarding proposed regulations
13	July 16, 2015 Letter from E. Austin Short to Joseph Jackewicz, Jr.
14	September 18, 2015 Letter from Tony Domino
15	September 21, 2015 Letter from William E. Powers, Member, New Castle County Council, to Robert Garey
16	September 21, 2015 email from George Smiley, Member, New Castle County Council
17	December 2, 2014 Letter to Hon. Chris Bullock, President of New Castle County Council
18	March 11, 2015 Letter to Hon. Chris Bullock, President of New Castle County Council
19.	Email chain between Anthony deFiore, Legislative Aide to New Castle County Council President, Chris Bullock, and E. Austin Short, DDA, covering the period December 3, 2014 through June 17, 2015
20	September 22, 2015 Letter from Christine Whitehead
21	September 30, 2015 email from Charles P. O'Brien
22	September 22, 2015 Letter from Karl D. Messer
23	September 23, 2015 Letter from Stewart Ramsey
24	Delaware State News Affidavit of Publication relating to publication of notice of extension of time for submitting written comments until October 12, 2015

- 25 News Journal Affidavit of Publication relating to publication
of notice of extension of time for submitting written comments
until October 12, 2015
- 26 Letter from Dr. Christopher A. Bullock, President of New Castle
County Council, requesting an extension of the deadline for
submitting written comments
- 27 Letter from Edwin Kee, Secretary of Department of Agriculture to
Dr. Christopher A. Bullock, responding to request for extension
- 28 Undated Letter from Bill Powers to Edwin Kee, Secretary of
Department of Agriculture
- 29 October 11, 2015 Memo from Christine Whitehead to William
Denman
- 30 October 12, 2015 Letter from David B. Carter, President of
Delaware Audubon Society
- 31 Summary of County Contributions to Delaware Aglands
Preservation Program
- 32 Public Meeting Notice as reported on Delaware.gov on August 25,
2015