IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHRISTOPHER CARTANZA, W. WAYNE BAKER, LYNN STABLEY, SANDRA L. CARTZANA, WILSON BAKER INC., personally and as Class Representatives and OTHER PERSONS SIMILARLY SITUATED,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2641-MG
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, an agency of the State of Delaware, NEW CASTLE COUNTY, KENT COUNTY, and SUSSEX COUNTY, political subdivisions of the State of Delaware, and JOHN R. HUGHES, individually and as Secretary of the Delaware Department of Natural Resources and Environmental Control,	)	
Defendants.	)	

MASTER'S REPORT

Oral Argument: October 1, 2007
Date Submitted: February 6, 2008
Draft Report: March 20, 2008
Final Report: October 10, 2008

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GLASSCOCK, Master

Defendant Delaware Department of Natural Resources and Environmental Control ("DNREC") has created maps depicting Natural Areas ("NAs") and State Resource Areas ("SRAs") pursuant to Chapters 73 and 75 of Title 7 of the Delaware Code. At issue in this case is whether the inclusion of plaintiffs' properties on the maps deprived or will deprive plaintiffs of certain property rights. Plaintiffs also allege that the adoption of the NA and SRA maps by DNREC violated their constitutional rights to procedural and substantive due process and equal protection of the law. Plaintiffs seek a declaratory judgment and injunctive relief as well as damages against the Secretary of DNREC. For the reasons below, because I find that the designation of land as an NA is an act with no independent legal significance, I conclude that plaintiffs do not have standing to challenge defendants' identification of lands for inclusion on the NA maps or their approval of the NA maps. DNREC's designation of properties to the SRA maps is contrary to its statutory authority, and thus void.

I. PROCEDURAL HISTORY AND FACTS

On December 22, 2006, plaintiffs, who are owners of land designated as NAs or SRAs,[1] filed suit, challenging the adoption of the NA and SRA maps. Specifically, plaintiffs and class members alleged[2] that the designations violated both procedural and substantive due process under the Delaware and the United States Constitutions, equal

[1] Though defendants challenge the standing of certain plaintiffs on the grounds that they do not own land designated as NAs or SRAs in fee simple absolute, I have already certified the class of approximately 3000 plaintiffs represented by named plaintiffs after specifically finding that certain class representatives do own designated land and that other requirements for class certification were otherwise satisfied. Therefore, because defendants' arguments regarding certain named plaintiffs' ownership will not affect the decision of this Court today, I need not further address these arguments.

[2] On August 9, 2007 during a teleconference, I issued an oral ruling certifying the class pursuant to Court of Chancery Rules 23(a) and 23(b)(2). On September 10, 2007, I entered an order to that effect.

protection under the United States Constitution, and constituted arbitrary and capricious government decision-making in violation of Delaware administrative law.

On January 30, 2007, defendants DNREC and DNREC Secretary John R. Hughes ("Hughes" and, with DNREC, the "State Defendants") moved to dismiss, which I denied on March 1, 2007. Thereafter, the State Defendants, plaintiffs and class members, and defendant New Castle County each separately moved for summary judgment. Here, I resolve only the motions filed by the State Defendants and plaintiffs.[3]

Plaintiffs challenge the process by which DNREC identified land for inclusion on three sets of NA maps (the initial maps, the 1988 maps, and the 2006 maps) and on two sets of SRA maps (the 1990 maps and the 2006 maps). In addition, plaintiffs challenge DNREC's ultimate approval of the NA and SRA maps. Of particular significance is that the statutory regime empowering DNREC and its advisory councils makes an important distinction between the effect of designation as an NA versus an SRA: if land is designed an NA, such designation has no independent legal significance. Land so designated is merely included on a registry of other property similarly designated, a "wish list" of property that the state has an interest in acquiring. In contrast, however, is the effect of an SRA designation: if land is designated an SRA, then, once DNREC adopts the SRA maps, the counties *must* include properties so designated in their obligatory

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[3] Plaintiffs do not challenge New Castle County's zoning code and, instead, seek only an order from this Court prohibiting all the counties from relying on the NA maps. Pl. Answering Br. in Opp'n to Def. New Castle County's Mot. for Summ. J. at I.C. That is, if the NA maps are invalidated, this would have no effect on New Castle County's Code. *Id.* Plaintiffs explicitly state that: "1) the Plaintiffs are challenging DNREC's approval of the Maps; and 2) the County is merely a nominal party in this case for purposes of obtaining their compliance with a court order invalidating the Maps." *Id.* at III. Because plaintiffs challenge only *state* action and seek only to enjoin New Castle County's reliance on the maps, New Castle County's motion is moot.

comprehensive development plans to comply with the explicit statutory mandate. In addition, each county government must adopt zoning ordinances that shall apply to SRA lands. Zoning ordinances that enact these guidelines and standards must be adopted within eighteen months of receipt of the SRA maps from DNREC or else the counties suffer financial repercussions. The clear intent of the SRA legislation is to protect SRA properties from development via the local zoning process.

Plaintiffs seek an order declaring the NA and SRA maps legally invalid; permanently enjoining all defendants from relying on the NA and SRA maps "in any way"; and finding defendant Hughes personally liable under 42 U.S.C. § 1983 for damages, the amount of which to be determined after a future evidentiary hearing. Plaintiffs also request the Court to compel DNREC to recommence the process of evaluating, recommending, and adopting NAs and SRAs.

II. ANALYSIS

Plaintiffs and the State Defendants seek summary judgment. In order to demonstrate an entitlement to summary judgment, the movant must show that no genuine issue of material fact exists and that the party is entitled to a judgment as a matter of law.[4] In considering the factual record in connection with these motions, I must draw all reasonable inferences in favor of the non-moving party.[5]

For the reasons described below, I conclude that the State Defendants are entitled to summary judgment on plaintiffs' challenge to the inclusion of their property on the NA

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[4] Ct. Ch. R. 56(c).
[5] *See, e.g.*, *HIFN, Inc. v. Intel Corp.*, No. 1835-VCS, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007).

maps because plaintiffs lack standing to assert this claim. The State Defendants' production of the SRA maps was done in contravention of the enabling legislation, and is thus void.

A. Natural Areas

1. Relevant Statutory Authority: Chapter 73 of Title 7

The Natural Areas Preservation System (the "NAPS"), enacted as Chapter 73 of Title 7 of the Delaware Code, was created because the General Assembly determined that "it is necessary and desirable that areas of unusual natural significance be set aside and preserved for the benefit of present and future generations before they have been destroyed"[6] by the continuing population growth and economic development of the state. To effectuate this purpose, DNREC was directed to establish and maintain a registry of such areas, "that such areas be acquired and preserved by the state, and that other agencies, organizations and individuals, both public and private, be encouraged to set aside such areas for the common benefit of the people of present and future generations."[7]

For and on behalf of the state, DNREC is authorized and empowered to acquire natural preserves or any interest or rights therein so long as not made through the exercise of the power of eminent domain; only *voluntary* means may be used.[8] Additionally, DNREC has the power and responsibility, among others, "[t]o make surveys and maintain registries and records of unique natural areas within the State; . . . [and] [t]o

[6] 7 *Del.C.* § 7301(a).
[7] § 7301(b).
[8] *See* § 7306(a).

promote and assist in the establishment, restoration and protection of, and advise in the management of, [NAs] . . . and otherwise to foster and aid in the establishment, restoration and preservation of natural conditions within the State elsewhere than in the system."[9]

In 1981, under its power "[t]o formulate policies for the selection of areas suitable for registration,"[10] DNREC formulated regulations, which were approved by then-Secretary John E. Wilson III, for the selection of NAs (the "NA Regulations").[11] To further the implementation of the NAPS, the NA Regulations identify at least two criteria that must be satisfied for NA designation: unusualness and representativeness.[12]

The NAPS also created the Delaware Natural Areas Advisory Council (the "NA Advisory Council") to "advise the Secretary [of DNREC] on the administration of nature preserves and the preservation of natural areas."[13] "Natural area" is defined as "an area of land or water, or of both land and water, whether in public or private ownership, which either retains or has reestablished its natural character (although it need not be undisturbed), or has unusual flora or fauna, or has biotic, geological, scenic or

[9] § 7307(6), (8) (citing 61 Del. Laws, c. 212, § 2).
[10] § 7307(2).
[11] *See* Ex. 44 to Pls.' Answering Br. in Opp'n to State Defs.' Mot. for Summ. J. (Regulations of DNREC, Division of Parks and Recreation Governing Natural Areas and Natural Preserves, July 1, 1981).
[12] *Id*. § 2.20.
[13] 7 *Del C.* § 7305(a).

archaeological features of scientific or educational value."[14] Among other duties, the NA Advisory Council is charged with the responsibility of "[r]eview[ing] and mak[ing] recommendations regarding inventories and registries of natural areas and nature preserves."[15]

Counsel for the State Defendants confirmed at oral argument that, once land has been designated an NA and included on the NA maps forwarded to the counties, the statute does not require the counties to use the NA maps or NA designations for their zoning purposes.[16] The sole purpose of the NA designation is to identify lands that may then be recommended for acquisition (by gift or voluntary sale/purchase) as nature preserves.[17]

2. Adoption and Approval of the Natural Area Maps

i. The Initial NA Maps

The initial NA maps that DNREC adopted after NAPS was enacted were contained in a 1978 book published by the Delaware Nature Society. The NA Advisory Council recommended the adoption of those maps in their entirety. DNREC followed this recommendation.

[14] § 7302(5).
[15] § 7305(e)(2).
[16] Tr. at 23–24 (Oct. 1, 2007 hearing).
[17] See §§ 7302, 7303, 7305(e).

ii. The 1988 NA Maps

The next set of NA maps that DNREC adopted was approved in 1988. These maps were based on an expansion of the previously adopted maps from the 1978 Delaware Nature Society book. C. Ronald Vickers ("Vickers), manager of DNREC's Land Preservation Office within the Division of Parks and Recreation prepared the 1988 NA maps. Addition of new areas to the NA maps was the result of analysis of older aerial photography from the 1980s, topographic maps, and available reports or research, such as wetland studies, and rare plant or rare animal information. There was no field research conducted specifically for the 1988 NA maps. Instead, research conducted by DNREC staff in connection with other programs was used. When deposed, Vickers testified that he could not recall the number of site inspections or any documentation describing the findings of those inspections. Vickers also stated that there was no written record memorializing the recommendations to add properties to the 1988 NA maps. Additionally, plaintiffs note that, though the NA Regulations were adopted in 1981, there is no documentation to demonstrate that the 1988 NA maps properly complied with the NA Regulations.

iii. The 2006 NA Maps

In 2003, DNREC began the process of updating the NA maps by gathering information to identify lands for inclusion in the 2006 NA maps. Vickers stated that the 1998 NA maps were one resource that was consulted in developing the 2006 NA maps. Only one site specific investigation was done in the process of preparing updates to the

NA maps. At that time, Robert Line ("Line"), DNREC's NAs Program Manager, was responsible for compiling information to update the NA maps. From 1999 through 2004, Line gathered data both to evaluate the adequacy of the 1988 NA maps and to potentially amend the maps. He reviewed the 1988 NA maps and concluded that there were gaps in them.

In 2005, Eileen Butler ("Butler") succeeded Line as the NAs Program Manager. She was provided with all data and research regarding the NA map update that had been prepared by Line. In addition to this information, Butler and her team also relied on DNREC geographical information system mapping layers in completing the updating of the NA maps.

Before the maps were adopted, DNREC and the NA Advisory Council held public information sessions, or "workshops," in each county to inform the public about the process before the NA and SRA maps were finalized. Defendants note that these workshops were not statutorily required. Notice of the workshops was published in at least one newspaper in each county[18] and was also posted on DNREC's website. In addition, a press release, which received newspaper attention, was sent out on April 18, 2006.[19]

On May 3, 2006, the NA Advisory Council held a meeting at which it recommended the NA maps for adoption. This meeting was advertised via legal notice

[18] Notice of the workshops was published on April 2, 2006 and April 12, 2006.
[19] Specifically, the workshops were held on April 25, 2006 in Kent County; April 26, 2006 in Sussex County; and on April 27, 2006 in New Castle County.

published on April 26, 2006. All meetings of the NA Advisory Council were also posted on DNREC's website under public meeting notifications.

On September 27, 2006, Hughes signed orders adopting the maps depicting NAs that had been recommended for adoption by the NA Advisory Council. The adopted maps were forwarded to the counties on or about October 16, 2006.

3. Plaintiffs Lack Standing to Challenge the NA Maps

Plaintiffs allege that the procedure described above, under which their property was designated part of certain NAs, was unlawful for several reasons. The party invoking the jurisdiction of the Court bears the burden of first establishing the elements of standing.[20] To establish standing, a plaintiff must demonstrate: (1) an injury in fact; (2) a causal connection between the injury and the conduct of which plaintiff complains; and (3) that a favorable decision is likely to redress the injury.[21] Here, I determine that because there is no injury resulting from the State Defendants' actions, and therefore, necessarily, no causal connection, plaintiffs lack standing with respect to their claims challenging the NA maps.

The designation of lands as an NA has the effect of placing those properties on a registry of lands which the NA Advisory Council could recommend DNREC acquire as nature preserves. DNREC could acquire nature preserves either through voluntary purchase and sale (that is, not through the power of eminent domain) or by gift from the

[20] *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1109 (Del. 2003) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).
[21] *Id.* at 1110.

owner.[22] The designation, of itself, places no restrictions on the owner's use or enjoyment of the property. Therefore, plaintiffs cannot show that a wrongful designation, should one exist, would result in a loss of property rights or other damage.

Plaintiffs point out that New Castle County has adopted a land-use code (the "UDC") which imposes restrictions on land, in part, by importing DNREC's designation of the property as an NA into the UDC.[23] In other words, New Castle County uses the NA designation as a marker for permitting and denying certain uses of the property According to plaintiffs, the state is thus denying them property rights by designating their lands as NAs. But in fact, the state is doing no such thing. Nothing in any state statute or DNREC regulation requires New Castle County to import the NA designation. Instead, it is New Castle County which has provided in the UDC that areas designated NAs by the state constitute the County's "Critical Natural Areas" which are then scrutinized by the County to determine what level of protection from development is required. Even were I to assume that this means that all lands designated by DNREC as NAs in New Castle County were subject to increased protection from development, and if I assume for purposes of this motion that DNREC's NA designations are arbitrary, it would be the importation (and alleged misuse) of the NA designation by the County that would result in harm, not the designation by the state. In a proper case, of course, a plaintiff property owner could challenge the County's zoning decisions under the UDC, something which plaintiffs here have foregone. But they have no standing to challenge the actions of the

[22] § 7306. The record is silent as to whether any NAs have been acquired by DNREC.
[23] *See* UDC §§40.05.420, 421 and corresponding tables.

DNREC itself.[24] The plaintiffs point out that any challenge to the UDC itself may now be untimely. The fact that plaintiffs may have failed to challenge, in a timely way, the importation of the NA designation by New Castle County, for purposes of zoning,[25] does not confer standing to challenge the action of DNREC in making the designation for entirely separate purpose, which has no impact on the plaintiffs.[26]

In *Toll Brothers, Inc. v. Wicks*[27] this Court reviewed an allegation that the Delaware Department of Transportation ("DelDOT") had wrongfully refused to grant an approval of a development plan. For purposes of the motion to dismiss before it, the Court assumed that New Castle County policy, contrary to the County Code, was to deny land use applications absent DelDOT approval. Because the deprivation of rights, if any, would arise from the actions of the County, not DelDOT, the Court held *inter alia* that the plaintiff had to proceed against the County after its application was denied, rather

[24] Similarly, if New Castle County made zoning decisions based on the powerball drawing, property owners' complaints would lie against the arbitrary nature of the County's actions, not against the Delaware Lottery Commission.

[25] The parties have not placed before me, and I make no decision on, the issue of whether the importation of newly-designated NAs into the UDC for zoning purposes represents an amendment to the UDC which permits challenge under 10 *Del.C.* § 8126, nor do I make any determination here that the statute of repose has run against the plaintiffs with respect to such a challenge to the UDC. New Castle County points out that only one named plaintiff, Lynn Stabley, owns property in New Castle County, and that he has sought neither a development permit nor a zoning variance. Nothing in this report prohibits any plaintiff from contesting restrictions on the use of his property via an application for a zoning variance or permit, including appeal to the Board of Adjustments and appellate courts.

[26] In fact, the challenge to the action of DNREC which the plaintiffs make here—that NA designations did not comply with statutory requirements or DNREC regulations—is irrelevant to the injury plaintiffs allege, that New Castle County may limit development of plaintiffs' property through its zoning authority because that property is included within a designated NA. The statutory and regulatory NA designation criteria were not promulgated with County zoning in mind; and the NAs as actually designated may be contrary to statute and regulation but appropriate for New Castle County zoning use; compliant with law but inappropriate for zoning use; or some other combination of the two.

[27] No. 1314-N, 2006 WL 1829875 (Del. Ch. June 21, 2006).

than against DelDOT. "The fact that *County officials* are mistaken about the letter of the law, however, does not create a right of action *against DelDOT*."[28]

The *only* effect of an NA designation resulting from the statutory scheme described in detail above, on land so designated, is that the land is included on a "wish list" of properties that the state would like to acquire solely through voluntary means. This means that NAs are *not* at risk of acquisition through eminent domain. The state statutory regime for NAs, in contrast to that of SRAs as discussed below, imposes *no* duties or obligations on the counties. Thus, the assertion that inclusion of land on the NA maps or designation as an NA results in an injury to the landowner cannot be sustained by rational inference and the designation of land as an NA lacks independent legal significance.

B. State Resource Areas

1. Statutory Authority: Chapter 75 of Title 7

Under the Delaware Land Protection Act (the "DLP Act"), DNREC is directed to designate State Resource Areas ("SRAs") for protection by county and municipal governments. Under the DLP Act, SRAs are "those open space lands duly identified by the [Open Space] Council and adopted by [DNREC] for protection."[29] "Open space," in turn, is defined as "as any open lands characterized by (a) great natural scenic beauty, or (b) 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

[28] *Id.* at *6–7.

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 architectural sites . . ..”[30]

In the DLP Act, the General Assembly created the Delaware Open Space Council (the “OS Council”) to “advise the Secretary [of DNREC] on all matters relating to the administration, implementation and financing of this protection program; site selection; methods of protection; and interagency and intergovernmental coordination among public and private land preservation agencies.”[31] Specifically, the OS Council has the power and duty to, among other things, “[r]eview and recommend to [DNREC] for adoption, after public hearing, state resource area maps.”[32] The OS Council is required to create “standards and criteria” to use in evaluation of lands and waters for inclusion as SRAs.[33] This was, therefore, a condition precedent to the creation of SRAs, because SRAs could not be identified unless and until the OS Council created the criteria. Despite the clarity of this statutory mandate, this requirement was not satisfied; no definitions of the specific legal criteria for designation on the SRA maps were created by the Council.[34] Because the OS Council failed to develop the required criteria, such criteria could be neither

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[29] 7 *Del. C.* § 7504(11).
[30] § 7504(6), (11).
[31] § 7505(a).
[32] § 7506(2).
[33] § 7507(a)(1). *See also* § 7506(1) (The Council shall “[r]eview and recommend to the Department for adoption, after a public hearing, criteria for delineation, and dedication of open space”); § 7506(13) (The Council shall . . . “[r]ecommend to the Department for adoption, after public hearing, any rules and regulations as may be necessary to carry out any provisions of this chapter.”).
[34] Vickers’ Dep. at 22. In fact, it is unclear what universal criteria DNREC ultimately applied in creating the SRA maps.

forwarded to nor adopted by DNREC.[35] At oral argument, counsel for the State Defendants conceded that the OS Council did not adopt standards and criteria.

The OS Council consists of nine members of which one is appointed, respectively, by each of the Senate and the House of Representatives, with the seven remaining members appointed by the Governor. Of those, four "shall be persons who have been active or have shown an interest in preserving open space." Three of the seven members are to be appointed from New Castle County, and two each from Kent and Sussex. The Council members are to be divided by political party. The Secretaries of Agriculture and State, the Director of the Delaware Economic Development Office and the State Liaison Officer for the Federal Land and Water Conservation Fund, or their designees, shall advise the OS Council as non-voting members.[36]

In other words, the Legislature delegated the power to an appointed citizens group to review and recommend criteria for delineation of open space, and to develop and forward to DNREC standards and criteria "consistent with the purposes of [the DLP Act] for evaluating the lands and waters of the state for inclusion as State Resource Areas" from that open space.[37] The adoption of the criteria for delineation of open space was to follow a public hearing. The statute is clear that this council of citizens, informed by a

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[35] At oral argument, the Court specifically asked counsel for the State Defendants, Robert F. Phillips, about whether the OS Council has developed the criteria, as required by statute:

Master Glasscock:	. . . Did [the Open Space Council] ever develop standards and criteria?
Mr. Phillips:	Not to my knowledge.
Master Glasscock:	Those were never forwarded to the department.
Mr. Phillips:	Not to my knowledge.
Master Glasscock:	And were never adopted by your department, obviously?
Mr. Phillips:	Not to my knowledge.

Tr. at 14 (Oct. 1, 2007 hearing).

[36] § 7505.

public hearing, and not DNREC, was empowered to "develop and forward to the [DNREC] for adoption" the "standards and criteria" that DNREC was to then use to evaluate property for inclusion in SRAs. Only after the criteria for open space and SRAs were developed by the OS Council would DNREC be empowered to designate and adopt SRAs consistent with those standards and criteria.

Under the statute, the OS Council and DNREC were required to update the SRA maps "at least every 5 years," after which DNREC was required to "send copies to the affected County for inclusion in the conservation element of [the County's] respective comprehensive plan[] and send copies to the affected municipalities for inclusion in their respective comprehensive plans."[38] Upon DNREC's adoption of the SRA maps, the counties are required to include them in the conservation element of their comprehensive plans no later than one year before the mandatory comprehensive plan updates.[39] In addition, the DLP Act requires the counties to adopt and incorporate overlay zoning ordinances with respect to lands designated on SRA maps.[40] Zoning ordinances that enact these guidelines and standards must be adopted by the counties within eighteen months of receipt of the SRA maps from DNREC, otherwise the counties face financial repercussions.[41]

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[37] §§ 7506(1), 7507(a)(1).
[38] § 7507.
[39] § 7507(c).
[40] *See* § 7508(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.").
[41] § 7508(d), (e).

The effect, in other words, is that property listed on the SRA maps is subject to mandatory regulation by local government. Designation as an SRA and the attendant effect of this designation differs from designation as an NA in two important ways. First, the statutory scheme creates the OS Council and requires that council to develop criteria to use in designation of land as an SRA. Second, the effect of inclusion on the SRA map is, itself, an act with independent legal significance insofar as plaintiffs' property rights are concerned, because the counties must include the SRA maps in their own development plans.

2. Adoption and Approval of the State Resource Area Maps

i. The 1990 SRA Maps

Vickers was involved in the adoption of the 1990 SRA maps. As with the 1988 NA maps, in preparing the 1990 SRA maps, DNREC used older aerial photography from the 1980s, topographic maps, and available reports or research, such as wetland studies, and rare plant or rare animal information.

ii. The 2006 SRA Maps

Vickers was the lead DNREC employee involving in preparing the 2006 SRA maps. The process of collecting information the SRA maps began in about 2004. Data and information gathered by other programs within DNREC, such as forest research, wetlands research, and information on rare plants and animals, were used for the SRA maps. In addition, green infrastructure maps were also relied upon in updating the SRA maps. Site visits were "rarely" done specifically for the NA and SRA maps.

As already noted, despite the statutory command, the OS Council did not develop any standards and criteria. Instead, DNREC proceeded to identify SRAs without the statutorily required standards and criteria.

DNREC first presented draft versions of the SRA maps to the OS Council at its regularly scheduled December 6, 2005 meeting. Then, at a special January 10, 2006 meeting, Vickers explained the process used in creating the maps. During this meeting, members of the OS Council expressed concerns that too much land was designated as SRAs for inclusion on the maps. The OS Council passed a motion directing DNREC to revise the maps and improve its presentation before proceeding with the public notice and comment process.

The next OS Council meeting was scheduled for March 14, 2006, though it was not actually held until May 9, 2006. In the meantime, however, on May 1, 2006, the OS Council conducted a public hearing to solicit public comment about the maps. The OS Council met again on May 9, 2006 and no action was taken on the maps at that time, to allow DNREC and the OS Council time to consider requested additions and deletions. The public record of the May 1, 2006 hearing was held open until the close of business on May 5, 2006. During the next OS Council meeting, on June 20, 2006, more public comment was received and certain additions and deletions to the maps were also discussed. The OS Council met again on September 19, 2006 for further public discussion of the maps. During this meeting, the OS Council decided that it did not have the authority to hear appeals from landowners. As described earlier, DNREC and the

advisory councils (the NA Advisory Council and the OS Council) held public "workshops," in each county during April and May 2006.

The OS Council recommended the approval of the draft SRA maps. Hughes ultimately adopted the maps on September 27, 2006.

3. The SRA Maps Are Nullities

Plaintiffs seek a declaratory judgment that DNREC's actions in designating their properties as SRAs violated due process because DNREC's actions were, according to plaintiffs, arbitrary and capricious, and because DNREC allegedly failed to give plaintiffs and others similarly situated an opportunity to be heard on the inclusion of their property on the SRA maps. DNREC counters that its actions were reasonable and, from a scientific and conservation viewpoint, laudatory. It denies that the procedure used to adopt the SRA maps violated plaintiffs' due process rights.

I need not reach these issues, however, because the powers granted to DNREC and the OS Council regarding the creation of the SRA maps and designations were limited to a procedure that has manifestly not been followed. The DLP Act delegates to DNREC and the OS Council certain legislative functions[42] in designating lands for protection at the county and municipal level. In undertaking these functions, the powers of DNREC are limited to those delegated by the legislature, and because I find that DNREC attempted to exceed those powers granted to it, the SRA designations are void.

As described above, the DLP Act created the OS Council to advise the Secretary of DNREC and, additionally, granted the OS Council the power and duty to "review and

recommend to the [DNREC] for adoption, after a public hearing, criteria for delineation, and dedication of open space" from which the SRAs are to be drawn.[43] The Legislature specifically directed that the OS Council then "shall, in conjunction with the interagency working group, develop and forward to the [DNREC] 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 enlargement; and evaluation of their importance; and information relating to their natural, historic or open space values . . . ."[44]

In briefing its argument in this matter, DNREC has argued strenuously that its selection of lands as SRAs was based on scientific and conservation standards and represents the best efforts of its employees over a period of years to achieve the statutory goals of the DLP Act. I do not doubt that the SRA maps represent the exercise of enormous effort by employees of DNREC. It is equally clear, however, that the OS Council has failed to provide criteria for designation of open space and SRAs. Instead, DNREC has attempted to proceed without the required criteria. This function was not delegated to DNREC under Chapter 75. It was specifically delegated to a citizen group whose members were chosen by the various branches of government according to explicit guidelines. It hardly requires a trained conservationist or an urban planner to see that open space in this state is dwindling alarmingly. I in no way mean to denigrate the hard

[42] Because of my decision here, I need not determine which of defendants' challenged actions were legislative in character and which were administrative, and what procedural process was due in connection with these acts.
[43] § 7505(a).

work of the many employees of DNREC who have evaluated property for inclusion in the SRA maps. However, an administrative agency such as DNREC can assume a legislative function only to the extent that such power is delegated from the Legislature to it.

> While the Legislative power resides, in plenary form in the General Assembly, as Article 2, Section 1 of the Delaware Constitution recites, it is recognized that Legislature may declare policy and announce legislative principals which shall apply in certain cases but delegate to the an administrative body the authority to apply those principals in factual situations as they arise.[45]

Where an enabling statute, such as the DLP Act, confers such a function on an administrative agency, the agency may not adopt regulations or take actions inconsistent with the provisions of the enabling statute.[46] In setting its own criteria by which SRA designations were to be made, and acting on those criteria to designate plaintiffs' and others' lands as lands which would be subject to development restrictions based on their purported SRA status, DNREC has exceeded the authority delegated to it by the Legislature under the DPL Act, and the purported SRA designations are void.[47] Since DNREC was not provided with standards and criteria by the OS Council for adoption by DNREC to evaluate lands for inclusion in SRAs, the SRA designations, and maps, are

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[44] § 7507.

[45] *In re: An Appeal of Dep't of Natural Res. and Envir. Control*, 401 A.2d 93, 95 (Del. Super. 1978) (*citing Opinion of the Justices*, 246 A.2d 90 (Del. 1968); *State v. Braun*, 378 A.2d 640 (Del. Super. 1977); *Carroll v. Tarburton*, 209 A.2d 86 (Del. Super. 1965)).

[46] *Id.* at 96; *see, e.g.*, *Wilmington Country Club v. Del. Liquor Comm'n*, 91 A.2d 250, 254–54 (Del. Super. 1952); *Am. Ins. Ass'n v. Del. Dep't of Ins.*, No. 05C-10-309, 2006 WL 3457623, at *3 (Del. Super. Nov. 29, 2006) (stating that "[i]n order to determine whether an agency exceeded its statutory authority, the Court must review the agency's enabling legislation to determine the extent of its power"); *State v. Amalfitano*, No 92-11-1612, 1993 WL 603340, at *2 (Del. Super. Apr. 5, 1993) (stating that an administrative agency must not exercise power exceeding that granted by legislation from which it arose).

[47] *See generally U.S. v. Larionoff*, 431 U.S. 864, 873 n.12 (1977) (quoting *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129 (1936)) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is . . . (only) the power to adopt regulations to carry into effect the will of Congress as expressed by statute. A regulation which does not do this, but operates to create a rule

nullities, and may not be relied upon by the counties in their comprehensive plans. Once such standards and criteria have been properly developed by the OS Council and forwarded to DNREC for adoption, DNREC should fulfill its statutory obligation to develop SRAs employing those standards and criteria.

C. Plaintiffs' Section 1983 Claims Fail

Plaintiffs allege that their properties were included in SRAs in violation of plaintiffs' procedural and substantive due process rights. They seek damages under 42 U.S.C. § 1983. In order to successfully seek damages under section 1983, plaintiffs must demonstrate that they were deprived of a federal or constitutional right and that the damages resulted from conduct taken under color of state law.[48] Because I have found that the creation of the SRA maps without using criteria developed by the OS Council was beyond DNREC's authority and was thus void, I have not reached the more stringent analysis of whether the actions of DNREC, had it had the power to take them, would have resulted in constitution violations. In any event, I find it unnecessary to undertake such an analysis because, as the matter now stands, there is no causal connection between the actions of DNREC and any infringement of constitutionally protected property interests held by plaintiffs. If the SRA maps as created had been produced by DNREC to the counties, the counties would have been required to include them in their development

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out of harmony with the statute, is a mere nullity.")

[48] *E.g.*, *Collins v. Figueira*, No. 04C-06-009, 2006 WL 1817092, at *1 (Del. Super. June 23, 2006).

plans. Some imposition upon plaintiffs' property rights would have occurred.[49] However, this legal action intervened and the counties agreed not to incorporate the challenged SRA maps pending its outcome. I have now determined that the SRA designations are legal nullities for all purposes of the DLP Act.[50] They will not be implemented pursuant to the DLP Act through any county ordinance, and to the extent they are referenced in any county comprehensive plan, the designations are void. Therefore, neither a constitutional violation nor resulting damage has occurred, and plaintiffs are not entitled to proceed under section 1983.[51]

III. CONCLUSION

For the foregoing reasons, the State Defendants are entitled to summary judgment on the claims arising from the designation of the NAs, and on the Section 1983 claims. DNREC's SRA maps are void.

/s/ *Sam Glasscock, III*
Master in Chancery

[49] I make no finding as to whether this hypothetical diminution would have been sufficient to arouse due process protection.

[50] Nothing in this report should prohibit any parties' use of the maps or data contained therein for purposes other than the designation of SRAs under the DLP Act.

[51] *See, e.g.*, *Collins*, at *3 ("to maintain a § 1983 claim, the plaintiff must establish a 'causal link between the official conduct and the alleged deprivation of a constitutional right'") (citation omitted). Because I find no relief is available to plaintiffs under section 1983, I need not reach the various immunity arguments raised by the State Defendants.