IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

IN RE: 244.5 ACRES OF LAND	:	
	:	
THE VILLAGE, L.L.C., a Delaware limited liability company,	:	C.A. No. 98C-02-021
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
DELAWARE AGRICULTURAL LANDS FOUNDATION, a body and corporation of the State of Delaware; JOHN F. TARBURTON, in his official capacity as Secretary of the Department of Agriculture; and FARMS LANDS, L.P., a Delaware Limited Partnership,	:	
	:	
Defendants.	:	

Submitted: May 4, 2001
Decided: August 22, 2001

MEMORANDUM OPINION

On Plaintiff's Motion for Summary Judgment. Denied.
On Defendants' Motion for Summary Judgment. Granted.

Constantine F. Malmberg, Young & Malmberg, P.A., Dover, Delaware, Attorneys for the Plaintiff.

Thomas H. Ellis, Department of Justice, Wilmington, Delaware, Attorney for the Defendants.

WITHAM, J.

On this 22nd day of August, 2001, upon consideration of the Plaintiff's and Defendants' Cross Motions for Summary Judgment and their oral arguments pursuant thereto, the Court finds the following:

The Village at Cannon Mill ("Plaintiff" or "Village") entered into a contract on May 23, 1996, to purchase land on which they planned to place a development with single family and townhouse styled housing. Farm Lands, L.P., the owner of 244.5 acres adjacent to the Village's property, filed an application with the Delaware Agricultural Land Foundation ("Foundation") to create an agricultural preservation district pursuant to the provisions of the Delaware Agricultural Lands Preservation Act (the "ALPA"), 3 *Del. C.* § 901, *et seq.* Farm Lands' application received final approval from the Foundation on January 13, 1998. The Village filed the action *sub judice* against the Foundation, John F. Tarburton and Farm Lands (collectively "Defendants"). This is the third opinion in the trilogy concerning the 244.5 acres of land in question.[1] In this matter, the property owner's

[1] In retrospect, the Court believes that it may have been more efficient to combine the immediate arguments with the previous opinion on the takings issue. This is especially true since virtually no discovery has taken place.

right to develop his land competes with the declared policy of the state to conserve, protect and encourage the improvement of agricultural lands. The Court is not going to repeat the facts from its January 19, 2001, opinion as these summary judgment motions involve the same set of undisputed facts.[2]

[2] *See In re: 244.5 Acres of Land; The Village, L.L.C. v. Delaware Agricultural Lands Preservation Foundation*, Del. Super., C.A. No. 98C-02-021, Witham J. (Jan. 19, 2001), Mem. Op. at 1-2 (detailing factual background of case).

The first opinion in this piecemeal litigation was in response to Defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. The Court denied the Motion to Dismiss, but stayed Counts I–V pending the outcome of Count VI. In staying the first five counts, the Court found that the Village had "not exhausted the State's procedures for determining whether a taking has occurred, and if so what compensation is due from the State for this taking."[3] After the Court's ruling on the motion to dismiss, Defendants filed a Motion for Summary Judgment as to Count VI. Plaintiff filed a response opposing this motion, and four days later Plaintiffs filed a cross motion for summary judgment. The Court issued its second opinion on January 19, 2001, granting the Defendants' Motion for Summary Judgment with respect to Count VI,[4] finding that no taking had occurred of the Village's property.[5] The Court's second opinion also

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[3] *In re: 244.5 Acres of Land; The Village, L.L.C. v. Delaware Agricultural Lands Preservation Foundation*, Del. Super., C.A. No. 98C-02-021, Witham, J. (Feb. 10, 2000), Order at 1.

[4] *In re: 244.5 Acres of Land; The Village, L.L.C. v. Delaware Agricultural Lands Preservation Foundation*, Del. Super., C.A. No. 98C-02-021, Witham J. (Jan. 19, 2001).

[5] The Court notes for the parties that the United States Supreme Court recently issued *Palazzolo v. Rhode Island*, --- U.S. —, 2001 WL 721005 (June 28, 2001) which supports the Court's analysis of the immediate facts using the factors from *Penn Central*. In *Palazzolo* the Court discussed partial regulatory takings cases in which the landowner is not deprived all economic use of their land and stated that

> Our polestar instead remains the principles set forth in Penn Central itself and our other cases that govern partial regulatory takings. . . . The outcome "depends largely 'upon the particular circumstances [in that] case.' *Penn Central, supra*, at 124 (*quoting United*

resolved Counts I and V.

Currently before the Court are cross motions for summary judgment with respect to the remaining counts of the Complaint (II, III and IV). These counts are as follows:

> II. The Village's due process rights were violated by insufficient notice of the meeting, insufficient opportunity to be heard and that the Foundation was neither neutral nor detached.

> *States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)). . . . As before, the salience of these facts cannot be reduced to any "set formula." *Penn Central*, 438 U.S., at 124 (internal quotation marks omitted). The temptation to adopt what amount to per se rules in either direction must be resisted. The Takings Clause requires careful examination and weighing all of the relevant circumstances in this context. *Palazzolo* at 17-18.

III. The Foundation failed to follow the procedures for notice and hearing of case decisions.

IV. The Foundation and Farmland Advisory Board failed to establish an adequate record and failed to set forth on the record the factual basis for its decision.

The State also continues to ask for summary judgment to dismiss from the case John F. Tarburton, the Secretary of the Department of Agriculture, sued in his official capacity. In deciding part three of this trilogy, the Court will first review the process of establishing an agricultural preservation and then address each of the three remaining counts individually.

Superior Court Civil Rule 56 governs motions for summary judgment. The rule states that summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When cross motions for summary judgment are filed the analysis is very similar. In *Emmons v. Hartford Underwriters Insurance Co.*, the court stated that "when opposing parties make cross motions for summary judgment, neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law."[6] The court has also stated that when

[6] *Emmons v. Hartford Underwriters Ins. Co.*, Del. Supr., 697 A.2d 742, 743 (1997); *Playtex FP, Inc. v. Columbia Casualty Co.*, Del. Super., 622 A.2d 1074, 1076 (1992).

cross motions for summary judgment are filed "the parties implicitly concede the absence of material factual disputes and acknowledge the sufficiency of the record to support their filing of cross motions for summary judgment."[7] While the parties may "implicitly concede" the absence of material factual dispute, the Court must still evaluate the motions under Rule 56 and determine that no material issues of fact do exist and that one party is entitled to judgment as a matter of law. The Court is persuaded that material issues of fact do not exist and will evaluate the law to decide the dispositive summary judgment motions.

Our Legislature through 3 *Del. C.* § 907(a), (b) and (c), prescribed the procedure for "Establishment of Agricultural Preservation Districts." The Court will attempt to map out that procedure and weave it into the undisputed facts of the case *sub judice*. The first step under 3 *Del. C.* § 907(a) is for the landowner to submit an application to the Delaware Agricultural Lands Preservation Foundation ("Foundation"). In the immediate case, the application was submitted on October 24, 1997. Pursuant to § 907(a), the Foundation has forty-five (45) days to review the application to see if it complies with the requirements of

[7] *Browning-Ferris, Inc. v. Rockford Enterprises, Inc.*, Del. Super., 642 A.2d 820, 823 (1993).

§ 908 and accept or reject such application. If the application is accepted, the Foundation submits the application to the Farmland Preservation Advisory Board ("Board") and to the Planning and Zoning Commission ("P&Z Commission") for the county in which the land sits. The Board reviews the application in accordance with § 906(d), and has 60 days to reach a decision or their silence is deemed an approval. On January 6, 1998, the Farmland Preservation Advisory Board for Kent County approved the immediate application. The P&Z Commission must comply with all of their procedural requirements and they have 90 days to reach a decision or their silence is deemed an approval. In Kent County, this agency is called the Kent County Regional Planning Commission. On January 8, 1998, the immediate application was approved by the Kent County Regional Planning Commission but modified to deny the application for a twenty-five (25) foot wide strip contiguous to the Project. The application is then reconsidered for final approval by the Foundation at its next regularly scheduled meeting.

At this stage in the application process, the Foundation determines whether or not the land in question will be established as an Agricultural Preservation District. To establish an agricultural preservation district, two of the following three agencies must approve the application: the Foundation as the State agency, and the two county agencies involved, the Board and the P&Z Commission. In the immediate case, the Foundation published notice on January 6, 1998, in both the *Delaware State News* and the *Wilmington News Journal*, which stated that the application for the preservation district in question

would be before the Foundation at its January 13th meeting. At the January 13, 1998, meeting, Plaintiff's attorney, Mr. Malmberg, spoke on their behalf concerning the effect the agricultural preservation district would have on Plaintiff's proposed development. David Edgell, from the Dover Department of Planning, also spoke on Plaintiff's behalf, highlighting the time disparity in the land use/development processes in this case. According to Mr. Edgell and the record before this Court, the Village had been working with the City of Dover since August/September of 1996 in the conceptual and planning stages of their development.[8] However, the agricultural preservation district did not begin its application process until a year later in October, 1997. On January 13, 1998, after hearing Plaintiff's comments, the Foundation established the 244.5 acres as an agricultural preservation district. Thereafter, Plaintiff brought this action, pursuant to 3 *Del. C.* § 927, which states that "[j]udicial proceedings to review any rule, regulations or other action of the Foundation or to determine the meaning or effect thereof may be brought in the Superior Court of this State." In brief, Plaintiff argues that the Foundation violated their due process rights of notice and fair hearing, failed to comply with the Administrative Procedures Act and failed to make an adequate record of their January 13th decision.

[8] This Court is unaware of what communication took place to advise Kent County or the Board of the existence of Plaintiff's proposed development prior to January 13, 1998.

I. Is the Village a proper party entitled to constitutional rights of due process, proper notice and a hearing before a neutral and detached tribunal?

Plaintiff's first contention in Count II is that they should have been considered a party before all three of the agencies that reviewed the Defendant Farm Lands' application. In support of this contention, Plaintiff points to the zoning decision of *Tate v. Miles*[9] as support for the idea that as a contiguous equitable landowner, they have standing and should have been considered a party before the three reviewing agencies. The Court generally agrees that the Village, as equitable owner of the property in question since May 23, 1996, is properly a party. With respect to considering Plaintiff a party before all three agencies, the Court does not know what difference this would make under these facts as Plaintiff attended the meetings and voiced their concerns. For purposes of this motion, the Court will consider Plaintiff, as equitable owner of land contiguous to the agricultural preservation district in question, a party with proper standing.

The Village claims that as a proper party they are entitled to due process, proper notice and a hearing before a neutral and detached tribunal. Defendants argue that because the Court held in its previous opinion that no taking occurred, the Plaintiffs do not have a constitutionally protected due process interest worthy of Fourteenth Amendment protection. The Court agrees that because no taking occurred, there is not a constitutional

[9] *Tate v. Miles*, Del Supr., 503 A.2d 187 (1986).

due process concern present. However, when a State delegates its power to regulate land use to an agency such as the Foundation and no taking has occurred, the question that remains is whether the procedural prerequisites of the delegated power have been satisfied.[10] Plaintiff argues that the Foundation did not follow the procedural requirements for notice and neutrality of the tribunal.

[10] *See Green v. County Council of Sussex*, 508 A.2d 882 (1986).

The allegations raised by the Plaintiff put front-and-center the extremely difficult position in which the facts of this case leave the Court. Section 910 appears to be written for the inverse of the current situation. The intent of the ALPA appears to be the protection of existing farmlands as new development spreads into the rural, farmland areas. Here, the facts present a situation where, at least conceptually, the development was in existence before the agricultural preservation district was formed. After careful review of the ALPA, the Court finds this case to be an anomalous, difficult situation not entirely accounted for in the Act. One of the primary problems is that the ALPA does not account for becoming embroiled in a zoning-type dispute. Pursuant to § 910(a)(2), the fifty (50) foot setback requirement only applies to a "new subdivision development" which is not defined in the statute. In order to explain or fill this gap, the Court's previous opinion used the permit-plus rule to determine whether or not Plaintiff's subdivision should be considered a "new subdivision or development" under § 910.[11] While the Plaintiff was in the conceptual, planning stages of their development, they had not applied for a building permit. Therefore, under the permit-plus rule, as applied by this Court, the Village is considered a new subdivision development.[12] Defendants argue that this same reasoning

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[11] *In re: 244.5 Acres of Land, The Village, L.L.C. v. Delaware Agricultural Lands Foundation*, Del. Super, C.A. No. 98C-02-021, Witham, J. (Jan.19, 2001), Order at 3.

[12] *Id.*

applies to determining the standing and due process rights of Plaintiff. The fact that no taking has occurred means that the Plaintiff has minimal due process rights. These rights were not violated by the actions of the Foundation. Therefore, all that remains for the Village to argue is that the Foundation did not comply with the legislatively enacted procedures for establishing an agricultural preservation district. In Count II, Plaintiff also alleges that the Foundation did not follow the procedural requirements for notice and neutrality of the tribunal. No facts have been presented to the Court to show that the Foundation was not neutral and detached; therefore, the Court will only address Plaintiff's argument that they were not given proper notice.

The only meeting that the Village appears to argue was improperly noticed was the January 13, 1998, meeting of the Foundation.[13] Notice for the January 13th meeting was published on January 6, 1998, in the *Delaware State News* and the *Wilmington News Journal*. The only notice requirement in the ALPA is § 928 which states that "[f]or any public hearing conducted under the provisions of this chapter, the Foundation shall provide

[13] The Court bases this on the fact that Plaintiff has not discussed or presented the regulations that govern notice for the Board or the P&Z Commission. Therefore, the Court will assume that both of these agencies complied with their regulations and procedures since Plaintiff has not produced or questioned their application to this case.

at least 20 days advance notice." Defendants respond to this with two answers: first, that there is a difference between a "public meeting" and a "public hearing," and second, that by appearing at the January 13th meeting, presenting their case and not raising their timeliness concerns, the Village has waived any notice arguments.

Defendants' first response is that the twenty (20) days notice required in § 928 applies to "public hearings" and the decision that was rendered on January 13th occurred at a "public meeting" of the Foundation. The language of the ALPA does include the term "**public hearing**" in § 904(a)(1),(2),(3) and (b)(21) when referring to hearings at which criteria, requirements rules or regulations for the Foundation are established or changed. Then in § 928, the ALPA states that "[f]or any public hearing conducted under the provisions of this chapter, the Foundation shall provide at least 20 days advance notice published in a daily newspaper of general circulation throughout the State." On the other hand, § 903(d) states that "[a]ll votes on matters before the Foundation shall be conducted at **meetings open to the public**, and such meetings shall be timely noticed." According to Defendants, the January 13th meeting was a § 903(d) meeting, requiring "timely notice" and not a "public hearing" under § 928 requiring twenty (20) days notice. The Court agrees that the Act differentiates between the notice required for matters decided at public hearings and those actions taken at the general meetings open to the public. In addition, the Court is persuaded that voting on final approval of an application does not fall under

any of the listed reasons for holding a public hearing in § 904. The Court also considered the Freedom of Information Act, 29 *Del. C.* § 10001, *et seq.* The Freedom of Information Act discusses "Open Meetings" in § 10004 and specifically states in § 10004(e)(2) that "[a]ll public bodies shall give public notice of their regular meetings and their intent to hold an executive session closed to the public, at least 7 days in advance thereof." For all of these reasons, the Court finds that the seven days notice for the January 13th meeting is sufficient.

Defendants' second response is that the Village waived their notice arguments by attending and not raising any notice concerns at the meeting. The transcript of the January 13th meeting reveals that the Village's counsel, Mr. Malmberg, attended the meeting and argued his client's position with the assistance of David Edgell. Defendants claim that by not raising any notice concerns at the meeting and arguing the merits of their case, the Village has as a matter of law waived any notice concerns. The Court agrees that Plaintiff waived their deficient notice claims by showing up and arguing the merits of the cause without ever mentioning that they believed procedural irregularities existed with respect to the meeting(s).

Therefore, under the undisputed facts and circumstances presented in this case, the Court finds that ALPA's "timely notice" requirements in § 907 were met by the Foundation's one week notice given for its January 13th meeting. In addition, Plaintiff's claim that it did not have proper notice fails because they argued the merits of their

position (the request to abate the effect of the fifty-foot buffer) before all three agencies.[14] Rather than raising the notice concerns and putting their objections on the record at the public meeting, Plaintiff chose to pursue the merits of their position and wait to raise the notice issues until this litigation. The Court therefore agrees with the State that even if timeliness issues existed, they were waived by such actions.[15] The State's motion for

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[14] The Court believes Plaintiff presented their position to all three agencies based on page 6 of the Transcript before the Foundation in which Mr. Malmberg references his time before the other two agencies: "When this came before the Agricultural Review Committee, I think that's the proper name, [the Court believes this to be the Farmland Advisory Board for Kent County], we brought up the issue why are [sic] we here . . . discussion (inaudible) punted to the Kent County Regional Planning Commission and the Kent County Regional Planning Commission agreed with us and carved out that 25 foot strip on the contiguous piece of property."

[15] On an aside, the Court notes that Plaintiff has not been able to point the Court to any specific procedural requirement with which the Foundation failed to comply. Because the Act is not intended to be a "case decision" or act as a zoning regulation (*See infra* Section II (discussing case decisions under the APA)), the drafters did not build the same notice requirements into the preservation district process as are required for zoning regulations and case decisions. There are at least two plausible explanations for this. First, the buffer zone requirement in § 910 only applies to "new subdivision developments" not existing landowners; therefore, the State may not have felt it necessary to notice existing landowners of something that has no immediate effect on them. The only group of people to whom notice matters is the individual or corporation who wants to put a new subdivision development on the neighboring land in the future. One other possibility (and the one not addressed by the statute) is that the current unaffected landowner may plan to develop his property in the future. Obviously, there is no crystal ball for the State or its agencies to foresee or predict who that might be; however, it would seem appropriate to notice all contiguous landowners as one of them may be contemplating developing their property. The immediate case represents that exact problem–a virtually simultaneous creation of an agricultural preservation district and a new subdivision development by an existing owner. The second explanation as to why the ALPA does not have specific notice and record requirements in the application process for agricultural easements is that the Legislature intended to tap into the existing procedure of the

summary judgment as to Count II of the Complaint is GRANTED.

II. Does the Administrative Procedures Act apply to the Foundation?

Plaintiff claims that the Administrative Procedures Act ("APA"), 29 *Del. C.* § 10101, *et seq.* applies to the Foundation. According to Plaintiff, the APA and all of its procedural requirements apply to the Foundation. Specifically, Plaintiff claims that the Foundation did not follow the APA's procedural requirements for notice and hearing of

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Board and the P&Z Commission. By including three separate reviewing agencies, each with their own individual procedural requirements, the proper parties would be given adequate notice. In fact, in the immediate case, Plaintiff presented its position before all of the individual agencies and has only argued that the application's final approval before the Foundation was improperly noticed. The Court would prefer that the State Legislature instruct the agencies and courts on the appropriate procedure in these situations to avoid this type of procedural dispute in the future.

case decisions and may have also violated the provisions regarding *ex parte* communications. Pursuant to § 10115 of the APA, twenty (20) days notice is required "[w]henever an agency proposes to formulate, adopt, amend or repeal a regulation," and pursuant to § 10122 of the APA, "[w]henever an agency proposes to proceed for a case decision, it shall give 20 days' prior notice to all parties." Because Plaintiff only received seven days notice for the January 13th meeting they claim that the Foundation's decision should be reversed and a new, properly noticed hearing/meeting should be held.

Defendants argue that the APA does not apply to the Foundation. According to Defendants, 29 *Del. C.* § 10161(a) lists the agencies to which the APA applies and the list in § 10161(a) does not include the Foundation. Therefore, § 10161(b) applies to the Foundation as it states that "[a]ll agencies which are not listed in subsection (a) of this section shall only be subject to subchapters I and II and §§ 10141, 10144 and 10145 of this title." Subchapter I is titled "Policy and Definitions" and Subchapter II is titled "Agency Regulations." Other than defining the term "case decision" in Subchapter I, the APA does not discuss case decisions until Subchapter III which does not apply to the Foundation pursuant to § 10161(b). Defendants also argue that the Foundation's decision that the 244.5 acres in question would be an agricultural preservation district does not fit squarely within the definition of "case" or "case decision" or "regulation" in § 10102.[16]

[16] 29 *Del. C.* § 10102. Definitions.
(3) "Case" or "case decisions" means any agency proceedings or determination that a named party

as a matter of past or present fact, or of threatened or contemplated private action, is or is not in violation of a law or regulation, or is or is not in compliance with any existing requirement for obtaining a license or other right or benefit. Such administrative adjudications include, without limitation, those of a declaratory nature respecting the payment of money or resulting in injunctive relief requiring a named party to act or refrain from acting or threatening to act in some way required or forbidden by law or regulation under which the agency is operating.

(7) "Regulation" means any statement of law, procedure, policy, right requirement or prohibition formulated and promulgated by an agency as a rule or standard, or as a guide for the decisions of cases thereafter by it or by any other agency, authority or court.

The Court agrees that pursuant to § 10161(b) the APA applies in only a limited fashion to the Foundation. In addition, the Court finds that the Foundation's approval of an application is not a "regulation" or "case decision" as defined in the APA. Therefore, the notice requirements for a "regulation" in Subchapter II do not apply to approving Defendant Farm Lands' application nor do the notice requirements for "case decisions" in subchapter III of the APA apply to the Foundation. In fact, the twenty (20) day notice requirement for adopting or changing "regulations" at public hearings in the APA is consistent with the notice requirements for public hearings in §§ 904 and 928 of the ALPA. Plaintiff also alleged in the complaint that the Foundation may have violated the APA's provisions regarding *ex parte* communications; however, the prohibitions against *ex parte* communications are in § 10129 of Subchapter III which does not apply to the Foundation, and Plaintiff presented no evidence to substantiate this allegation. In conclusion, Plaintiff is correct that the APA does apply to the Foundation; however, the APA applies in a limited fashion and was not violated by the Foundation in these facts and circumstances. The State's request for summary judgment as to Count III of the Complaint is GRANTED.

III. Did the Foundation fail to establish an adequate record?

The Village also claims that the Foundation failed to establish an adequate record and failed to set forth on the record the factual basis and reason for its decision. Based on

New Castle County v. BC Development Associates,[17] Plaintiff argues that Delaware law requires a governmental agency to create a sufficient record for zoning decisions for the decision to be valid. The only record presented to the Court in this matter was the transcript from the January 13th meeting.[18] If the Foundation's decision is a zoning regulation the record requirements of *New Castle County Council v. BC Development* and *Tate v. Miles* must be met. However, the ALPA's stated, statutory purpose is not to create new zoning regulations or ordinances but to "conserve, protect and encourage improvement of agricultural lands within the State for the production of food and other agricultural

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[17] *New Castle County Council v. BC Development Assoc.*, Del. Supr., 567 A.2d 1271 (1989) ([w]hen Council makes a rezoning decision without establishing the basis for its action, it thwarts the ability of a court to provide effective review. As we stated in *Tate v. Miles*, Del. Supr., 503 A.2d 187, 191 (1986), '[u]nless Council creates a record or states on the record its reasons for a zoning change, a court is given no means by which it may review the Council's decision.'").

[18] Defendants informed the Court at oral argument that minutes for the January 13 meeting also exist. These meeting minutes were never presented to the Court and were therefore not considered in deciding this summary judgment motion.

products."[19] In reality, one of the ALPA's practical effects, particularly in this case, is that the fifty (50) foot buffer resembles a zoning restriction on Plaintiff's property. This underscores the underlying problem in analyzing this matter, which is that the Foundation's approval of agricultural preservation districts is a hybrid decision and not a "case decision," zoning regulation or other established category. Similar to the notice issue discussed earlier, because the ALPA was not written to be a zoning regulation it does not explicitly address the issue of establishing a proper record for the approval of agricultural preservation districts.

[19] 3 *Del. C.* § 901.

The only requirement that a record be kept lies in § 928 of the ALPA which requires that a record be kept when the Foundation is conducting a public hearing. The only time public hearings are held is when the Foundation is adopting, amending or changing regulations.[20] The January 13th decision in the matter *sub judice* came from a public meeting not a public hearing. After reviewing the ALPA's record requirements, it becomes apparent that the record requirements only apply to the adoption or amendment of the Foundation's regulations and not the actual process of applying for an agricultural preservation district. At the January 13th meeting, the Foundation found that both of the other reviewing agencies approved the formation of the preservation district, listened to Plaintiff's arguments against imposing the fifty (50) foot buffer and then gave final approval to Farm Lands' application. There is no statutory or other legal requirement that the Foundation issue a final case decision in this hybrid, application approval process. Therefore, the transcript of the meeting is a sufficient record for the Court to review the Foundation's actions at the January 13th meeting. Therefore, the State's motion for summary judgment as to Count IV is GRANTED.

In conclusion, Defendants' Motion for Summary Judgment as to Counts II, III and IV is GRANTED and Plaintiff's Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

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[20] *See* 3 *Del. C.* § 904 (1), (2), (3) and (b)(21).

J.

dmh
oc: Prothonotary
xc: Order Distribution