

State Legislative Issues identified through Livable Delaware Department of Transportation

A number of legislative issues and concerns have been identified by Department of Transportation staff in reviewing the goals of Livable Delaware and the state investment strategies. These are summarized below. The first group of issues is specific to the Department of Transportation and these will be considered and prioritized as the Department develops our Legislative Agenda due later this fall. The second group of issues affects the Department of Transportation and its operations, but they are much broader in scope than transportation. We offer these as potential Livable Delaware initiatives to be championed by the Governor or the Office of State Planning Coordination. We would be happy to help conduct research and develop language in support of these initiatives if the Governor chooses to move forward with any or all of them.

Issues specific to the Department of Transportation

Site Plan Reviews: State Legislation would be required to mandate site plan review as part of the land development process in municipalities and to mandate municipal transportation ordinances. First, require local governments to create Development Advisory Committees to review land development plans at the conceptual stage. The committee should include a representative from the Department of Transportation. Second, the counties and municipalities should each adopt an adequate facilities ordinance for transportation. These ordinances should have endorsement from the Department of Transportation. (DuPlessis)

Support Facilities Reports: These reports exist to fulfill the requirements of a portion of State law that seems to have somewhat outlasted its usefulness. Eliminating the reports would require changing that law. Eliminating the reports while retaining their benefits would require changes to the Kent and Sussex County codes to include level of service standards. The county governments will have to be educated on the need for them to do this before they can be expected to do so willingly. By including level of service standards in their subdivision and land development regulations, Kent and Sussex Counties would enable themselves to deny approval of record plans for developments that would create or worsen traffic congestion. Presently they are unable to do so and appear to view that as DelDOT's role, which it is not. Repeal Delaware Code sections 29 Del.C. § 2661, § 4961, and § 6961, dissolve the agreements that the Counties and DelDOT negotiated as a result thereof, and instead require that each of the three counties include requirements pertaining to traffic congestion in their subdivision and land development regulations. A provision to accept New Castle County's current standards in this regard may be appropriate. (Brockenbrough)

Issues affecting but greater than the Department of Transportation

Limited Service Function Budgeting: New Castle County is required under 9 Del.C. § 1102 to shift its property tax load by giving its citizens credit for paying property taxes to municipalities for services otherwise provided by the county in the unincorporated areas. No such requirement exists for either Kent or Sussex Counties. This means that this state law in part, fosters development outside municipalities in the lower two counties. While this law and its effects are known to many persons with an interest in tax incidence and tax policy, it's also clear that Senator Cook and others have shown a keen disinterest in applying local service function budgeting requirements to the lower two counties. (Schrank)

Scenic & Historic Highways Program: At the county and local level, there is some concern that this Program will require enabling legislation if it is to have any affect on preserving agricultural land, something that is usually done at the state level. While the creation of the Program in and of itself will not cause any natural or cultural resource to be protected, the Program does provide the mechanism for these units of government and other interested organizations to identify a resource and develop a corridor management plan for its protection. Although the specific requirements of corridor plans are yet to be determined, the plan will serve to coordinate various regulatory mechanisms and preservation efforts (e.g., zoning, historic preservation, and/or agricultural preservation programs) rather than supercede them.

Tools for land preservation at the local level (agricultural zoning, environmental protections): Some of the problem with preserving open space and agricultural land lies with the lack of preservation tools at the local level. For example, although the counties and municipalities have the authority for zoning, the Delaware constitution (Article 2, Section 25) specifically excludes any body other than the General Assembly from enacting agricultural zoning or regulations. One result is that the vast majority of the land area of Delaware is zoned for suburban residential uses (by right) and can therefore be developed with little further oversight. Two pieces of legislation could improve this situation: Enabling legislation to allow land use agencies to create an agricultural zoning district, and legislation tying the use of (existing) farming tax credits to having agricultural zoning. Another problem is that in many parts of the state, environmental protections for wetlands, woodlands, riparian areas, floodplains, wellheads and aquifer recharge areas are lax or nonexistent. These can be updated through a combination of local subdivision regulations and state regulation. (Athey)

Create an environmental review process for environmentally sensitive areas: This is currently only an issue for Sussex County and a few Sussex municipalities, however, the potential exists for this to become an issue throughout the State. When the Cabinet Committee on State Planning Issues adopted the Strategies for State Policies and Spending, the map included a large coastal area in Sussex County classified as Environmentally Sensitive. At the time, the Cabinet Committee recognized that this area is special and unique to Delaware and deserves some special attention as development continues to occur. This area is experiencing great pressure to develop, however,

development can destroy the very qualities -scenic, environmental, recreational –that make it a desirable location. There is a need to understand the impacts of both individual developments and the overall pattern of development on the environmental resources of the area. The need for the state to create an environmental review process could be greatly diminished if the local land use agencies adopted significant environmental protections into their development codes.

Transfer of Development Rights (TDR) program: TDR enabling legislation currently does not enjoy the strength of a complimentary comprehensive planning and subsequent zoning. As a result, the market for TDR may not be strong enough or well organized enough to make it economically feasible. Specific sending and receiving areas need to be designated by each County in concert with Corridor Capacity Preservation and Agricultural Lands Preservation programs with the appropriate base zoning to create market demand.

Land Use Planning Act (LUPA) Reviews: Notably absent from the list of items reviewed are subdivision and land development plans. Most developments that occur are ones that can be built “as of right,” meaning that no annexation, rezoning, or conditional use is needed. The Land Use Planning Act process excludes these developments which is a problem because many other development activities affect the state and would benefit from review by the state.

A significant weakness of the Land Use Planning Act (LUPA) process is that the review comments are advisory. The local governments that receive these comments do not have to abide by them. Delaware is such a small state and is set up in such a way that the Counties and municipalities, do not factor in the total cost associated with a land use decision. In the case of the Transportation system, the state is responsible for 88% of the roads in the state. Since the Counties and municipalities are responsible for very little in the way of transportation, the cost to build and maintain the transportation system in the county or municipality is not factored into the decision making processes by these entities. This is true for other services provided by the state which in other states are generally born by the county or municipality. The end result is that the counties and municipalities gain the revenue associated with an upgrade of the land use and the state assumes the cost for the infrastructure improvements and maintenance associated with those changes. Other aspects of Delaware’s state government that may be similarly affected include the State Police, the Department of Education, and the Department of Natural Resources and Environmental Control.

There is a disparity in the level at which land use decisions and Land Use Planning Act (LUPA) comments are made. Land use decisions are made by elected officials (city and county councils) acting on staff recommendations with input from appointed (planning) boards. LUPA comments are made at the state level by agency staff that are not elected or appointed. To give state employees broad authority over the actions of local governments does not seem advisable. It might be logical to give some additional authority to the Cabinet Committee on State Planning issues (CCSPI).

A more appropriate approach might be for the cabinet agencies or the Office of State Planning Coordination to periodically review their Land Use Planning Act (LUPA) comments on similar land use decisions and to suggest legislation to address specific issues that are repeatedly raised as LUPA comments. For example, suppose that the state wanted to stop a certain type of development in certain areas and the local governments did not want to do so. It would be better to prohibit that type of development in those areas by state law than to give the Office of State Planning Coordination the authority to stop a local government from approving such a development through LUPA comments. (Brockenbrough, Athey)

Transit Planning Process: It is impossible to successfully plan and design transit service that will meet the needs of the public without involvement in the Land Use Planning (LUPA) process. Typically, transit planners only review major subdivision plans or plans that involve a traffic impact study (TIS). Therefore the LUPA process needs to be expanded to include more projects.

Create an interagency review process: There is currently no formal statewide process for exchange of development information between the counties and the municipalities, the counties and counties, or the municipalities and municipalities. In some cases this information exchange occurs on an informal basis and in some cases the information exchange does not occur at all. It is important that the counties and municipalities have the opportunity to review and submit comments and recommendations regarding major developments outside their jurisdictions that will impact them. This could be accomplished by adding these situations and development proposals to the LUPA process, however, it would be better to foster direct communications between the affected governments rather than OSPC acting as a central clearinghouse. State law already requires intergovernmental coordination in the development of the county comprehensive plans, requiring intergovernmental coordination with respect to land development proposals is the next logical step.