

# BAILIWICK NEWS

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## Public debate on land development and water protection in Slab Cabin Run watershed continues.

By Katherine Watt

Centre Region Council of Government General Forum members will receive a detailed written update on the Whitehall Road Regional Park (WRRP) development process ahead of their Monday, October 24 meeting (7:30 p.m. at the COG building), following an announcement about the update from COG Executive Committee Chair Eric Bernier at the committee meeting Oct. 18.

### *Background*

In 2010, the COG General Forum unanimously approved a master plan for the Whitehall Road park assuming that the housing developer for an adjacent parcel would pay to install the access road and utilities. The resolution included the stipulation that revisions to the plan would require additional unanimous votes; the General Forum approved some revisions in 2013. In 2011, a large Fulton Bank loan was taken out, the bulk of which (about \$5.2 million) was earmarked for the Whitehall Road park project.

However, the adjacent housing development has been delayed over the last five years, most recently due to litigation that successfully challenged the Ferguson Township Board of Supervisors' Nov. 16, 2015 approval of the housing project. On July 18, 2016, the Centre County Court of Common Pleas ruled against the township – finding the 2015 supervisors' actions to be unlawful. The developer (Toll Brothers) has appealed to Commonwealth Court.

To date, *Bailiwick News* has published three reports on conservation and land development conflicts in the Zone 2 recharge area for the public Harter-Thomas water wells owned by the State College Borough Water Authority: on Sept. 9, Sept. 16 and Sept. 30. Those reports can be found online at [steadystatecollege.wordpress.com/bailiwick-news](http://steadystatecollege.wordpress.com/bailiwick-news). New and/or newly obtained information about financial and political considerations is below.

### *Financial Considerations*

About \$3.7 million of the original \$7,578,000 regional park borrowing in 2011 has been spent on Oak Hall Regional Park and Hess Field construction, and the five participating municipalities have been paying down that portion of the debt for several years.

Prior to Oct. 13, there were three publicly-expressed possibilities for the remaining roughly \$4.7 million held in

Fulton Bank accounts for Whitehall Road Regional Park design and construction.

First, the Centre Region Parks & Recreation Authority (Parks Authority) could move quickly through studies, easement negotiations, permitting and design to sign construction contracts by the June 1, 2017 drawdown date for the loan.

Second, the Parks Authority could go to the General Forum for a unanimous vote to apply to Fulton Bank to extend the loan past the June 1, 2017 drawdown date, and renew the municipal guarantees that expire on the same date.

Or third, the General Forum could intervene, by voting to close out the loan and municipal guarantees, pay down the rest of the debt from the Oak Hall and Hess Field projects, and leave the door open for the Parks Authority to come back later with a new master plan, new budget, and new request for municipal guarantees for new borrowing.

On Oct. 13, at the joint COG Parks Capital/Parks Authority meeting, Parks Capital Committee Chair Tom Daubert quietly mentioned a fourth possibility: that the Parks Authority could somehow transfer the balance of the money from the loan fund, to a Parks Authority holding account before June 1, 2017, without having signed construction bids, and without General Forum approval, based on the Parks Authority's legal theories regarding spending authorization.

At that same meeting, Patton Township Supervisor Jeff Luck announced that Patton Township had sent an official letter to COG, saying that they will not put any more money into the regional parks program beyond the money they must pay legally as part of the borrowing agreement for the current Fulton Bank loan.

Mr. Luck also stated that Patton Township supervisors had reviewed the 2006 Regional Parks Articles of Agreement, which included language (Section 5.3) requiring unanimous General Forum votes to approve contracts for construction; however, General Forum did not approve contracts for prior construction at the two other regional parks.

Luck said that Patton supervisors believed in 2006 that the provision was enforceable, but they have recently been told it is not enforceable. The contradictory interpretations of the agreement partly stem from an Aug. 15 legal memo drafted by solicitor Terry Williams, laying out some arguments about the interplay of the quasi-independent Parks Authority, which has borrowing authority, and COG, which does not have borrowing authority, but whose constituent municipalities have taxing authority, upon which municipal loan guarantees are based.

Dick Mascolo, a former Ferguson Township supervisor

and spouse of Parks Authority chair Sue Mascolo, was also at the joint Oct. 13 meeting. Mr. Mascolo expressed the opinion that, by approving the original master plan in August 2010, the participating COG municipalities are responsible for all of the phases of design and construction of all three planned regional parks, not just the first phases. Mr. Mascolo later clarified his position: “The municipalities are morally liable for costs to build the Regional Parks but are only legally responsible for costs for loans already issued.”

After the Oct. 13 meeting, I asked COG Finance Director Joe Viglione for data about the budget impacts if the General Forum votes to halt spending of the Fulton Bank loan immediately and not apply for an extension, instead returning the unspent balance of about \$4.7 million to Fulton Bank and paying off only the principal and interest for the funds spent up to this point.

On Oct. 19, I reviewed a binder of Fulton Bank loan documents (copies forthcoming). Two documents provided information about taxpayer savings that could be realized if the WRRP project is discontinued.

One is a March 16, 2015 “Schedule of Annual Debt Service on Centre Regional Recreation Authority Guaranteed Project Revenue Bond (Regional Parks Projects) Series of 2011,” prepared by Concord Public Finance. The other is a June 3, 2016 summary report on “Centre Region Parks & Recreation Authority Loan Draws and History, Regional Parks Loan” prepared by Viglione.

Those reports indicate that the principal and interest on the completed phase 1 Oak Hall and Hess Field construction will be paid off by roughly December 2019.

If the Whitehall Road project moves forward, for the 12 budget years between January 2020 and December 2031, the five participating municipalities will pay about \$6.2 million in additional principal and interest (about \$520,000 per year for the region) roughly as follows: \$1.75 million for Ferguson Township, \$1.46 million for State College, \$1.32 million for Patton Township; 1.13 million for College Township, and \$590,000 for Harris Township.

Not building the park would save taxpayers that \$6.2 million. Further, not building the park would eliminate the need for the five participating municipalities to collectively budget to pay about \$234,000 in annual operating expenses for Phase 1 amenities from opening day onward: the estimated operating cost presented on page 101 of the August 2010 WRRP master plan.

For perspective, during their recent 2017 budget review sessions, several COG Finance Committee members hesitated to endorse an additional \$8,800 contribution to the Schlow Library budget (spread over six municipalities), most of which is to bring 14 part-time staff members from \$12 per hour to \$13 per hour.

[The draft 2017 COG budget will be reviewed at the municipal level from now until November 17.]

On Oct. 19, I picked up about 300 pages of emails and attachments, exchanged with COG public employees and officials between March 1 and Oct. 15, 2016 regarding the WRRP project, obtained through the PA Right to Know process.

Among the documents was an exchange between Jeff Luck (Patton Township supervisor) and Jim Steff (COG Executive Director) on August 15 and 16. Luck asked Steff whether the Parks Authority has “signature authority to expend those funds today without the approval of the COG?”

Steff carefully responded: “All the funds for Whitehall Road Regional Park are in the name of the Authority...In 2012 the COG through its annual budget process transferred about \$1.3 million from the COG Regional Parks fund (C22) to CRPR Regional Parks fund (R15). Per the directive of the elected officials, these monies were spent prior to drawing any funds on the loan. Primarily, the transferred funds were invested in the development of Oak Hall Regional Park.”

This suggests that there should be a similar transfer in the current 2017 COG budget draft, including both the C22 source account and the R15 destination account, through which the General Forum members decide whether or not to transfer money between accounts. A keyword search for “R15,” got several hits, mostly on the pages related to the Regional Parks Capital budget. However, a keyword search for “C22” got no hits.

Another interesting aspect of many of the legal contracts surrounding the Whitehall Road Regional Park project – such as articles of agreement, land leases, and loans – is the seeming lack of exit clauses explaining which circumstances (passage of time, project delays, change in financial status), allow parties to withdraw from the arrangements without penalty, and how those rights to withdraw are to be implemented.

### *Political Considerations*

After the housing development controversy erupted in March 2015, the State College Borough Water Authority board participated in a July 2015 joint meeting with the Ferguson Township board of supervisors. SCBWA staff have assisted in drafting a stormwater management ordinance update for the township, adopted in June 2016, and are currently working on a source water protection overlay zoning ordinance.

Throughout, the water authority board has maintained public silence on the core issue – whether land development activity in the Zone 2 recharge area of the Harter-Thomas wells poses a “significant risk” to those wells. The public silence has been accompanied by private expressions of concern by water authority staff including director John Lichman, water authority board members Jeff Kern and Jason Grottini, and water authority consultant David Yoxtheimer, conveyed to elected officials and citizen activists.

Public statements have been circumspect. Kern, for example, stated on the record in July 2015 that if the water authority board members had been consulted before the September 2004 Ferguson Township upzoning decision – which changed the parcel from Rural Agricultural to R-4/Multifamily Residential, they would have advised against it, to protect public water, but acknowledged that the water authority was not consulted, and the rezoning occurred.

Similarly, Grottini and Yoxtheimer spoke on the public record at Ferguson Township on Jan. 18, 2016, expressing concern about development activity on the recharge area, but framing it as a cumulative risk. They said no one can precisely predict the date and location that a contamination incident will occur, but the more land disturbance is allowed, the higher the likelihood, and the baseline risk is high because porous limestone karst geography is fragile.

Several possible reasons for this public hedging have been proposed, including legal regulations barring the water authority from taking a clear public position; land sale contract language stipulating SCBWA silence; political pressure from developers and their supporters at Penn State and within local government agencies; and adverse employment pressure exerted on individuals employed by Penn State or public agencies with whom Penn State administrators have strong influence.

Whatever the reasons, in recent months, mixed messages from water authority representatives have added another layer of confusion to municipal public discussions.

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According to the July 21, 2016 SCBWA minutes, board member Rachel Brennan “informed the Board that the Source Water Protection Committee would be addressing this,” referring to development in the Harter-Thomas recharge area.

During park development discussions at Ferguson Township supervisors meetings on Aug. 1, a majority of the five supervisors agreed that, if the SCBWA issued a statement that development at the Whitehall Road site is a “significant risk,” the supervisors would consider that a “showstopper” causing them to withhold support for development. (C-NET video, Aug. 1, 2016, 151.00)

On Sept. 18, Toll Brothers published a full-page advertisement in the *Centre Daily Times*, claiming “our partnership with the SCBWA has even been suggested as the model for how responsible developers and local experts should work together.” (The ad did not cite a source.)

On Sept. 19, Nittany Valley Water Coalition spokeswoman Kelli Hoover gave a statement to Ferguson Township supervisors, including a report that, during conversations with Lichman and other SCBWA officials, she has been told that prior SCBWA officials endorsed the concept of the Whitehall Road park because they believed it was to be a small, passive, conservation-based park; they were not consulted on the active sports-field park plan prior to its approval by the COG General Forum in August 2010; and current SCBWA board members are concerned about threats posed by the 2010 park plan to public water.

In response, on Sept. 20, Ferguson Township Manager Mark Kunkle emailed Hoover, claiming the water authority had reviewed preliminary plans for the intensive park in 2014, and forwarding a copy of a two-page letter from Gwin, Dobson and Foreman dated April 10, 2014. The first comment by the engineer, Ken Beldin, reiterates that the proposed project is within the Zone 2 wellhead protection area.

I reached out to Grottini (SCBWA Source Water Protection Committee Chair) by email on Oct. 3, to ask whether there had been any action on Brennan’s July 21 statement. Grottini responded: “There has not been any action on that project in quite some time. We would expect COG to make contact with us again if and when the park discussions become more serious again. The subject has not made its way back to committee.” Apprised of Grottini’s response, another water protection stakeholder wrote: “I’m confused by that because I brought it up to John Lichman and he said the committee was working on it and I’d be happy about the resulting memo.”

The Ferguson Township supervisors also had a meeting on Oct. 3. Steve Jackson (Ferguson Township liaison to the water authority) gave his report, noting that SCBWA supported Judge Grine’s decision; appreciated NVWC activist work; and had “concern about the Whitehall Park design and its use of non-permeable surfaces.” Ferguson Township Planning & Zoning Director Ray Stolinas reported on source water protection overlay zoning ordinance drafting process, predicting that a draft could appear on planning commission and supervisor agendas by late October or early November.

Ferguson Township supervisor Rita Graef introduced into the public record a 2002 letter from then-SCBWA Executive Director Max Gill about the Whitehall Road Regional Park plan as he understood it, and the April 10, 2014 GDF review of the 2010 park plan. Supervisor Laura Dininni repeated her account of her conversations with Lichman about 2002 perceptions of the planned park as conservation-oriented, and said she would continue seeking documentation from Lichman and the water authority board to enter into the record.

On Oct. 7, Nittany Valley Water Coalition members sent a letter of objection to COG Executive Director Jim Steff, regarding September actions taken by the Parks Authority, the COG Parks Capital Committee and the COG Executive Committee (covered in the Sept. 30 *Bailiwick News* report). The group objected to the vote taken on Sept 8, 2016 at the joint Parks Authority/COG Parks Capital meeting about the Blue Course Extension access road and changes to Phase 1 of the park construction plan, as having been “taken without public notice” regarding “matters that the General Forum as a whole should decide.” They urged “the COG General Forum ... to take these matters up as soon as possible.”

On Oct. 13, 2016, during another joint Parks Authority/Parks Capital meeting, members of both committees continued to publicly express confusion about whether the SCBWA board has any objections to the Whitehall Road Regional Park sports complex project.

On Oct. 14, The *Centre Daily Times* “reported” on a new Toll Brothers public relations push. The story reported Toll Brothers “Campus Living Managing Director” Charles Elliott had announced a new corporate website about “The Cottages at State College” and urged concerned residents to send comments and questions to a new email address, to help Elliott understand their concerns.

On Oct. 18, at the COG Executive Committee meeting, Steff announced that COG had renewed the lease for a

farmer who raised corn on the 100-acre WRRP property this year, to allow him to farm during the 2017 growing season, since groundbreaking on the park can't occur until late fall next year, at the earliest.

Also on Oct. 18, the *CDT* published a letter-to-the-editor by Kelli Hoover of Nittany Valley Water Coalition. Hoover stated she doesn't "believe for a second that Toll Brothers cares about this community or that they don't already know what the citizens want. Citizens sued to stop this development on our watershed (Harter-Thomas wellfields) and won the suit because the Toll Brothers and Ferguson Township supervisors tried to override township zoning laws, according to the judge." Hoover further pointed out that "Toll Brothers settled with the EPA for \$741,000 for alleged discharge of pollutants at 370 sites in 23 states, including 40 sites located in the Chesapeake Bay watershed in violation of the Clean Water Act."

Hoover concluded: "State College has some of the cleanest drinking water left in the nation and we want to keep it that way. But there is more at stake here besides the risk of contaminating our drinking water supply by a huge development on our watershed. If Toll Brothers wins on appeal this would set a dangerous precedent, allowing developers to ignore municipal zoning ordinances anywhere in Pennsylvania."

On Oct. 20, I presented a statement to the SCBWA board, with proposed resolution language, requesting that by their November meeting, the board prepare to vote on the core issue – whether development activity in the Zone 2 area poses a "significant risk" to the water wells – or offer specific information about the legal, contractual, political or adverse employment reasons barring them from taking a public stand. Grottini announced that the Source Water Protection Committee would be discussing the issue at their next meeting, scheduled for Nov. 5.

## CRITICAL ANALYSIS

The public discussion of the WRRP project has raised many legal interpretation issues. What types of amenities must a park offer, to meet the "regional" standard? Are those amenities affordable under the current financial circumstances? What types of changes to a master plan meet the definition of "amendment" such that they must go to General Forum for approval? If Section 5.3 of the Regional Parks Articles of Agreement is unenforceable, which provisions are enforceable, against whom?

What actions are appropriate to meet the definition of "drawdown" for the Fulton Bank loan, and who can authorize those actions? Who has legal authority to make decisions to extend, refinance, guarantee and/or retire the loan that currently must be drawn down by June 1, 2017? What process does Fulton Bank regard as legitimate for securing municipal guarantees of the loans, given that neither the Parks Authority nor the COG have taxing power? Are there boilerplate contract exit rights when a specific contract is silent on the issue?

The bottom line is that the Parks Authority and COG Parks Capital Committee – by pushing for the WRRP despite the public safety risks and the financial burdens –

are trying to get Centre Region taxpayers to foot the bill to contaminate our own public water supplies, at a cost of \$6.2 million in principal and interest for construction, plus \$234,000 in annual operating costs.

In contrast, stopping the Whitehall Road Regional Park development process now offers regional elected officials an opportunity to simultaneously protect public water supplies and productive farmland, while realizing significant long-term cost savings for taxpayers already confronting very difficult budget decisions over the next few decades for essentials like police protection and sewer system maintenance.

Why does *Bailiwick News* cover these topics so extensively?

Because the Whitehall Road housing and park projects sit at the intersection of many crucial issues confronting Centre Region citizens: corporate Penn State's undue and publicly unaccountable influence over our local political economy, especially enrollment decisions, land flipping and zoning interference that set regional housing market conditions (luxury student housing displacing affordable workforce housing); Nittany Valley hydrogeology, public water systems, and farmland preservation; approaching limits on sewage treatment and effluent discharge capacity into Spring Creek; compromised regional planning frameworks; and stressed municipal budgets.

Currently, corporate Penn State increases enrollment to keep it higher than a growing local housing supply, so private investors and landlords can reap large profits and put competitive pressure on students (and their loan lenders) to pay higher rents. Corporate Penn State also buys agricultural land at low cost, maintains property tax exemptions while they knock over municipal zoning laws and regional planning limitations, and sells high to reap institutional profits, further facilitating private profits for investors who buy into the development corporations to whom the Penn State land is sold.

Each new occupied bed adds 8 to 12 pounds of nitrogen per year to the local wastewater treatment stream through food processing, urine, and feces. Maintaining and upgrading the sewage treatment infrastructure is a public expense: University Area Joint Authority ratepayers fund maintenance and upgrades to infrastructure that protects clean water downstream in Bellefonte and beyond, all the way to the Chesapeake Bay.

Thus, stopping the Whitehall Road Regional Park project could also open a window of opportunity to reassert democratic control over regional planning, and align it with long-term protection of essential public water resources for stable, non-growing populations.

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