

BAILIWICK NEWS

Reporting and critical analysis of State College public affairs

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Continuing public discussion of water protection and land development tensions

By Katherine Watt

This is a compilation of reports published at Steady State College between Oct. 21 and Nov. 28, updating previous Bailiwick News reports published Sept. 9, Sept. 16, Sept. 30 and Oct. 21.

INTRODUCTION

If built, the Whitehall Road Regional Park will impose unjustified financial and environmental burdens on the Centre Region community. Further, because of the political techniques used to bring the project to this point – preventing municipal officials from recognizing their power to stop the project as no longer viable under current conditions – it imposes an unjustified legitimacy burden on the Centre Region Council of Governments.

TIMELINE

As reported previously, in early July, the Parks Authority received a feasibility study taking into account new circumstances regarding environmental, permitting, and financial challenges resulting from the suspension of the adjacent Toll Brothers housing project. The study was passed along to Centre Region Council of Governments (COG) committees, and on July 25, the COG General Forum voted to refer the issues to municipal boards for discussion.

A wrench was thrown into the gears of transparent public governance on Aug. 15, when Conflicted Solicitor Terry Williams circulated a memo suggesting that the Centre Region Parks and Recreation Authority (Parks Authority) is an independent municipal authority, strongly implying that its independence exempts its board from having to justify projects on the merits and renders public deliberation moot.

State College Borough Council Chair Tom Daubert accepted Williams' analysis without question, shutting down discussion at the Aug. 15 Borough Council meeting, cancelling the August COG Parks Capital meeting, and then heavily curtailing discussion at the Sept. 9 Parks Capital meeting.

By October, the COG Finance Committee was reviewing agency requests for 2017 – including Parks & Recreation requests. Again, accepting the Williams memo without critical thought, nobody mentioned the proposed \$2.9 million appropriation from the Fulton Bank loan balance to the Regional Parks Capital account during the budget hearings, let alone insisted on a clear justification

from Parks & Rec staff and Parks Authority board members to support their view that the anticipated benefits of the park outweigh the financial and ecological costs.

[The \$2.9 million appropriation for 2017, when added to \$1.8 million held in a Fulton Bank CD since a refinance draw in May 2014, together comprise roughly \$4.7 million: most of the amount originally earmarked for the Whitehall Road project in 2011 but unspent as of June 2016.]

Water protection activists, in contrast, have made a clear case that the costs outweigh the benefits, by demonstrating that land development in the Zone 2 recharge area of public drinking water wells poses a high risk of contamination. See, for example, the 2007 SCBWA Source Water Protection Report, at p. 42: “The vulnerability of Wellfields 1 and 3 [Harter-Thomas wells] to surface contaminants exists as demonstrated by the presence of dye in these wellfields five days after injected into the watershed, traveling at a rate of up to nearly one mile per day.”

Despite multiple citizen presentations of the SCBWA's findings at venues all over the region, including back to the SCBWA board – several members of the COG Parks Capital Committee on Oct. 13 continued to express confusion about the SCBWA position, and interest in clarification on the risk profile of the Whitehall Road project. The confusion stemmed from evasive public statements by SCBWA Director John Lichman, who waffles for political self-preservation, and the public silence of the SCBWA board, which maintains silence for political self-preservation.

At the Oct. 13 Parks Capital meeting, Parks & Recreation Director Pam Salokangas also gave a brief update summarizing recent and upcoming meetings staff had held or would soon hold with other WRRP stakeholder agencies (PennDOT, Ferguson Township Planning Department, Penn State legal teams). At that meeting, Patton Township supervisor Jeff Luck indicated that no more money would be forthcoming from Patton Township beyond the original loan guaranty adopted for the first phase of construction. Luck mentioned the Patton Township board's recent unpleasant discovery that a 2006 Articles of Agreement provision requiring unanimous General Forum consent for construction contracts might be legally unenforceable, and conveyed his board's sense of “resignation” that a first phase of construction would probably move ahead despite municipal objections.

Additional discussion highlighted the fact that Parks Capital representatives trying to be fiscally and environmentally responsible were hamstrung by a lack of information about what park amenities could be affordable with the remaining money, given the many unanticipated cost pressures.

On Oct. 18, the COG Executive Committee bumped the Whitehall Road Regional Park issue from an Oct. 24 General Forum discussion agenda item down to an Executive Director informational item. Then Daubert cancelled the November Parks Capital meeting.

On Oct. 20, I carried the risk question from the Parks Capital committee to the SCBWA board, formally asking that the Source Water Protection Committee review the issue and come back with a resolution for the full SCBWA board to vote on Nov. 17, to publicly clarify the board's position on the risk, or explain why the board won't take a public position. I provided draft language: "The State College Borough Water Authority Board, on the recommendation of the SCBWA Source Water Protection Committee and SCBWA consulting hydrogeologists, formally endorses a resolution stating that land development activity in the Zone 2 recharge area of the Harter-Thomas wells poses a "significant risk" to those wells. We therefore recommend that public policy-makers in Ferguson Township and in the other Centre Region Council of Governments constituent municipalities, protect those public wells by enacting and enforcing legislation to prevent development and protect public water supplies."

On October 21, Andy McKinnon and Bernard Hoffnar of Nittany Valley Water Coalition had a private meeting with Lichman. McKinnon drafted a report on the meeting, including these observations:

"My guess is that [Lichman] sees his primary responsibility as providing abundant clean water to the public at an affordable price. He may feel it's a balancing act to maintain water quality but also keeping rates down; in other words, he needs development but wants 'sustainable development.' He may be afraid of pissing off some of these developers, such as the Toll Brothers and the Parks Authority, by expressing his concerns, risking losing the development, and having to raise rates...I can understand his position but it doesn't make him much of an ally of the NVWC or the public at large. And I certainly don't appreciate the fact that he misled me with his contradictory meanings and statements over the phone v. in the meeting. I do advocate for ongoing efforts to get a more community friendly commitment, or at least a more explicit statement as to its position, from the SCBWA."

In response, I wrote that Lichman's position makes perfect sense under the existing business model for public utilities. Conservation of any resource (land, water, sewage discharge capacity, electricity, oil, natural gas) inflicts chaos on the business models that these industries have used for the last 50-60 years. As existing users consume less, the organization that provides the resource makes less money in user revenue, so they try to add new users.

I advocated that our regional community deal with that problem, not by doubling down on development, but by deliberately restructuring local utility business models to create water financing models in which existing consumers pay-as-we-go for a water system with contributing/filtering ecosystems intact, serving a stable, non-growing

population. I contrasted this with the outdated business model through which development and population growth impair intact ecosystems providing water supply and filtration, and drive debt-funded purchases of mechanical water treatment systems (\$40 million and up) to remove contaminants.

I further advocated that – to inform citizen views on their political and financial choices – I'd like to see side-by-side financial assumptions and projections for those two scenarios for the next fifty years, at least, and more scenarios as suggested by others.

At about the same time, Ferguson Township supervisor Peter Buckland responded to a statement in the October 21 edition of *Bailiwick News*, regarding possible reasons for public hedging by the SCBWA board, noting that "these are only political considerations. There's nothing about individual people's informed risk assessments.

In response, I concurred with Buckland's characterization of the SCBWA board's silence as politically motivated, but reiterated my belief that the SCBWA board's official position on development in Zone 2 recharge areas is a crucial, missing piece of the public discussion. I also raised the question: "What assumptions – such as the economic value of real estate tax revenue as compared to the economic value of not needing to build new multi-million dollar water treatment plants – are being used to support various positions?"

Despite plans for COG staff to provide COG General Forum with a written update about the Whitehall Road Regional Park project for the October 24 General Forum meeting, no report was provided that evening. (A status report was provided for the Nov. 28 meeting; cost-benefit analysis was beyond the scope.)

On Oct. 28, ClearWater Conservancy announced the launch of the Slab Cabin Run Initiative, aiming to raise \$2.75 million by Sept. 2017 to fund purchase of conservation easements covering 300 acres of the Meyer and Everhart farms (along University Drive Extension) to protect the Harter and Thomas water wellfields. Since the end of October, ClearWater director Deb Nardone has been reaching out to municipal governments and the SCBWA, aiming to raise about half the total amount from public entity contributions.

On Nov. 17, COG Finance Director Joe Viglione gave the third quarter financial report to the Finance Committee. His presentation included several graphs showing that Fulton Bank loan draws associated with parks capital are a current "revenue" source for COG, albeit one with strings; the principal and interest must be paid back to the bank by future taxpayers.

In response, I published an analysis of Williams' Aug. 15 memo endorsing the legal theory that the Parks Authority could sue the Centre Region COG, if the COG failed to transfer the remainder of the Fulton Bank loan funds for the construction of the Whitehall Road Regional Park. I identified key differences between the *Orbisonia-Rockhill Joint Municipal Authority vs. Cromell Township* case cited by Williams, and the *Parks Authority v. COG* scenario.

In *Orbisonia*, a municipality tried to get out of paying for contracted, completed planning work done by a sewer

authority to bring Cromell Township and the sewer authority back into compliance with DEP regulations they were violating. In that case, the sewer authority could clearly claim a specific harm: they had already contracted and spent money for authorized work.

In contrast, the Centre Region is not violating any state laws mandating the provision of public parks, and although there may be one signed planning contract (for a traffic impact study by Stahl-Sheaffer) there are no signed construction contracts. To repeat: the balance of unspent money in the Fulton Bank loan fund as of June 2016 was about \$4.7 million: \$1.8 million held in a Fulton Bank CD, plus \$2.9 million being transferred via the 2017 COG budget. That money represents virtually all of the loan proceeds originally earmarked for Whitehall Road park "Phase 1" when the loan was taken out in 2011.

If the constituent COG municipal boards decide to return \$4.7 million to Fulton Bank, fully paying off the loan early, protecting the Harter and Thomas wells, and saving regional taxpayers about \$6.2 million in principal and interest payments between 2020 and 2031, the Parks Authority, would have a hard time making an evidence-supported claim that COG had inflicted specific harm or damages on them, a "material breach of the agreement" in the language of the *Orbisonia* case.

Also on Nov. 17, Jason Grottini briefly reported to the SCBWA board that the source water committee (Grottini, Gary Petersen, William Burgos, Rachel Brennan and Emory Enscom) met Nov. 7, discussed a number of issues including the proposed Zone 2 risk resolution, and declined to recommend that the full board discuss or vote on the issue. Grottini did not offer any information about why the source water committee dropped the matter.

On Nov. 18, I suggested that two General Forum members (a motion and a second) could test the hypothesis that the Parks Authority is not a truly independent municipal authority, but is, rather, financially dependent on municipal taxing power to pay its bills, including loan repayments.

Specifically, I suggested that General Forum members move to strike three lines from the proposed 2017 budget (R15-452-00-4393; R15-452-13-8610 and R15-000-00-3279) and see what emerged from the ensuing discussion.

On Nov. 20, COG Executive Director Jim Steff confirmed by email that the Parks Authority differs from the independent SCBWA and University Area Joint (Sewage) Authority, because – unlike the SCBWA and UAJA, whose boards adopt their own budgets based on their own revenue streams from fees and fee-backed borrowing – Parks & Recreation funding is folded into the COG budget and subject to the appropriations power of the participating municipalities.

On Nov. 22, COG Executive Committee Chair Eric Bernier asked some related questions of Viglione, probing for information about the budget appropriation and receipt technicalities. Viglione gave several vague responses to suggest that Regional Parks Capital line items are in the 2017 draft budget to give General Forum members a "holistic" understanding of the situation. He elided the issue of why an information-only (i.e., non-discretionary) item would be in the budget, and not simply presented to

officials as a memo or "matter of record."

At that same Executive Committee meeting, I asked what would happen if a municipality adopted a version of the 2017 budget that differed from the presented budget (i.e., made amendments during their ratification votes, due by Dec. 31). I was told by Bernier and others that COG procedures are set up to air and resolve conflicts at the committee level, which are formed by representatives from each municipality, before the final General Forum and municipal ratification votes; that there are no formal budget reconciliation procedures; and that distressed municipalities can note objections to the budget, and can pull out of programs or out of COG altogether, with one year's notice, although they remain obligated to pay debts incurred while participating in those programs.

Also on Nov. 22, I reported that Nittany Valley Water Coalition members have spent some time in recent months thinking about different uses that would be more appropriate for the 100 acres owned by COG and Ferguson Township, and, for that matter, for the roughly 350 acres still owned by Penn State and subdivided for future housing developments and roads. The water coalition had discussed scenarios in which legal and financial delays for the housing and park projects create an opening to pressure Penn State for conservation easements.

I expressed support for COG, Ferguson Township, Penn State and SCBWA putting the land they own in the Zone 2 Harter-Thomas recharge area into conservation easements, and further endorsed the eventual sale of the protected land to young farming families at cost (the per-acre prices paid by Penn State during acquisition in decades past).

Most of the land is still zoned Rural Agricultural, with minimum lot sizes of 50 acres allowing one dwelling per lot. About 10 small farms could operate on the 550 acres laid out as "Lands of PSU" in April 2004, producing seasonal and storage crops for sale, and sending their produce into urban State College using the CATA buses traversing Whitehall Road.

I also reported my sense that the Parks Authority became a hybrid of a non-independent COG agency, akin to the code enforcement agency, and an independent municipal authority, akin to the water authority, during a February 25, 2013 General Forum meeting – *after* the 2011 signing of the loan and loan guaranty documents, and speculated that a hybrid agency/authority may be a legally non-viable entity.

I further noted that there's a good reason for the parks and recreation budget being a subsection of the general COG budget, which Patton Township supervisor George Downsborough summed up in a Nov. 24 email: "UAJA and the SCBWA have income based on water rates, sewer rates and tapping fees. Therefore UAJA and SCBWA can borrow funds and secure those borrowings based on future revenue. Since the parks and rec fees go to COG, the CRPRA has no income to borrow against. The COG has borrowed the funds for the parks and those loans are secured by the taxing authority of the COG municipalities."

On Nov. 28, I published an open letter to General Forum members and engaged public on these issues, recommending that the General Forum strike the Regional

Parks Capital budget items from the budget before endorsing an amended version to send to the municipal boards for ratification or pull the Regional Parks Capital budget items out for separate review and, if warranted, separate ratification next year, after more information becomes available.

At the Nov. 28 General Forum meeting, Ferguson Township Supervisor Laura Dininni, made a motion to remove the Whitehall Road Regional Park appropriations from the draft 2017 COG budget, and State College Councilwoman Janet Engeman, seconded the motion.

The discussion on their amendment didn't cover a lot of ground, but several people stated that they'd never seen the Parks Authority do anything that wasn't fully supported by General Forum, and that if General Forum members wanted to see the Parks Authority change course and conveyed those wishes to Parks Authority board members, the changed course would probably happen.

Some supervisors commented on their sense that they must "honor" the obligation to pay back the \$7.6 million loan that was first obtained back in 2011, and extended several times in the intervening six years, of which roughly \$4.7 million remained unspent as of June 3, 2016. The implication was that it would somehow be dishonorable for COG municipalities to pay back the loan early, leaving the municipalities to make only the remaining installment payments for completed work at Oak Hall Regional Park and Hess Field, which will be done by roughly December 2019. I disagree: paying off the loan is fulfilling the obligation, even if it's done early.

In any case, the amendment failed to pass, and the main motion to endorse the 2017 proposed COG budget and forward it to the municipalities for ratification at their December meetings, passed.

Next spring, the saga will continue. In a few months, some entity will need to formally request that Fulton Bank extend the loan past the current drawdown date of June 1, 2017. If Fulton Bank is interested in doing that at all, the bank will want a renewal of municipal guarantees, encumbering future municipal boards, on behalf of future taxpayers, to pay back the principal and interest.

CRITICAL ANALYSIS

One operating principle of public legislative bodies is that agencies present planned activities and arguments about why those are in the public interest, such that taxpayers should pay for them. It's then up to the legislative body to make value judgments about whether the case presented by the agency is sound. Or not.

The public interest in fully-informed, transparent decision-making often conflicts with the human desire to not sit through long meetings.

The COG committee system seems to be designed to strike a reasonable balance between those opposing forces. Complex issues are to be hashed out at the committee level, leading to informed recommendations to the General Forum for votes.

Unfortunately, that system was deliberately short-circuited this year, on the Whitehall Road Regional Park issue, through at least two deflection maneuvers.

Deflection in time is when a governing board is told that they have the authority to make a decision, but in the past or in the future, not in the present.

An example is the interplay of "capital improvement plan" adoption, usually in the summer, followed by budget adoption, usually in December. Those interested in manipulating the system find it helpful to tell the boards in summer that they needn't worry about proposed costs, because it's "just a plan; there's no funding appropriated." Those same boards are then told in winter that they needn't worry about assessing the pros and cons of allocating funds for projects, because the projects were reviewed and approved back in the summer.

Deflection in power locus arises when one governing board is informed – and believes – that the power to make a decision rests with a subcommittee, a different agency, or a different governing board. When used successfully by off-stage manipulators, most elected representatives will believe that they must simply endorse a decision made elsewhere, earlier. As a result, no one is plausibly, publicly responsible for final decisions, good or bad.

These techniques were both used to manipulate local legislators during this year's budget adoption cycle.

The Parks Authority board has not had to publicly justify why today's and tomorrow's taxpayers should spend borrowed bank money to purchase a 2010 park plan, located at a site chosen in 2006, based on a general needs assessment endorsed by General Forum and member municipalities in 2001, using loan guarantees originally adopted by General Forum and member municipalities in 2011, under 2017 economic and environmental conditions.

And none of COG's legislators have publicly reviewed or debated the merits of the WRRP project under those conditions.

On Nov. 28, elected officials were not asked to vote for the regional parks capital appropriation because the project is a good idea. They were instructed to vote for the appropriation on the theory that their votes were a meaningless charade. There's a stark difference between the legitimacy of those two types of votes.

On the merits, Whitehall Road park is a bad project: wrong location, design, time, and cost. But thought-stopping is an effective way to prevent critical analysis.

In a few months, municipal legislators will take up the issue of renewing municipal guarantees for the Fulton Bank loan. I predict that loan extension advocates will point to the Nov. 28 General Forum vote on the budget as a reason why the members must extend the guarantees. Whether our local legislators resist that manipulation, and instead honestly, publicly grapple with the actual project costs and benefits, remains to be seen.

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