

# BAILIWICK NEWS

Reporting and critical analysis of State College public affairs

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## **Court ruling against Ferguson Township student housing development impacts regional planning**

By Katherine Watt

Part 1 introduces the governing frameworks and some of the history that has led to the current situation. Part 2 (to be published Sept. 16) will cover July and August public discussions about the issues, and provide critical analysis of options for moving forward.

### REPORT

The Centre Region Parks & Recreation Authority (Parks Authority) is currently wrestling with the implications of a recent Centre County court ruling in a land use appeal filed by Nittany Valley Water Coalition to stop construction of student housing near Whitehall Road and Blue Course Drive in Ferguson Township. The July 18 ruling by Common Pleas Judge Jonathan Grine reversed and vacated a Nov. 16, 2015 decision by the Ferguson supervisors to approve a Toll Brothers/Penn State development plan.

In his ruling, Grine wrote: “the basis upon which [Ferguson Township] and [Toll Brothers] rest their argument is essentially an attempted end-run around complying with the zoning ordinance applicable to the Rural Agricultural District,” whose intent is defined in Township ordinances as “preserving the quality of soils for crop and pasture use by limiting the conversion of prime cropland to nonagricultural uses.” The Grine ruling has been appealed to Commonwealth Court.

The ruling has also reopened a dormant debate about how to balance water and farmland resource protection interests against housing and park development interests, because the Whitehall Road Regional Park Master Plan, originally adopted in 2010, was predicated in part on the housing developer installing an access road from Whitehall Road to the landlocked park site.

Specifically, the suspension of the housing development has raised the question: “When do changes to a park master plan driven by external forces, along with changes in municipal appetite for debt-funded projects, become significant enough to send a previously approved project back to the COG General Forum for review requiring new unanimous consent of the municipalities?” From a broader perspective, it’s raised questions about the regional allocation of political power, and how to weigh the costs and benefits of centralization and decentralization of power.

### GOVERNING FRAMEWORKS

Since 1969, six participating municipalities have allocated tax revenue to support the Centre Region Council of Governments (COG), a voluntary coordination organization with no taxing authority and limited enforcement mechanisms for decisions, apart from contract law. The COG General Forum is a comprised of all the elected municipal legislators from State College, Ferguson Township, College Township, Patton Township, Harris Township and Halfmoon Township. The General Forum votes on proposals “to initiate, continue, modify or discontinue” COG programs.

The Parks Authority was created in 1970 under the Municipal Authorities Act of 1945, and includes all but Halfmoon Township. The Parks Authority is independent from the COG Parks Capital Committee, whose role is primarily to develop and recommend funding strategies for regional park facilities to the General Forum, so that the General Forum can use the taxing authority of its’ members to pay for park construction and maintenance. Under state law, individual municipalities may leave the Parks Authority under certain circumstances, but the authority itself can only be dissolved by an act of the state legislature, or, possibly, expiration of its articles of incorporation.

### SLAB CABIN WATERSHED PRESERVATION & DEVELOPMENT HISTORY

In 1999, Penn State University purchased a 26-acre parcel of Rural Agricultural land near Blue Course Drive and Whitehall Road, from the RK Mellon Foundation — a subsidiary of BNY Mellon — for \$99,307. The parcel comprises part of roughly 550 acres of University-owned cropland in the area by 2004, traversed by a tributary swale feeding Slab Cabin Run, and sloping steeply down to the Harter-Thomas water wellfields, ultimately feeding into Spring Creek and the Chesapeake Bay. (I think the unnamed tributary is etched in stone in the watershed map at the Penn State Arboretum.)

The land, on the southeast side of Whitehall Road, naturally filters two-thirds of the 5 million gallons of drinking water supplied daily to 75,000 customers by the State College Borough Water Authority (SCBWA). The wells are shallow (20-30 feet deep) and the watershed geology is unstable karst limestone and bedrock, putting the wells at high risk of contamination from introduced pollutants.

## Land Conservation & Groundwater Protection

In 2000, COG General Forum adopted the 2000 Centre Region Comprehensive Plan, establishing the Regional Growth Boundary. In the Harter-Thomas recharge area, the growth boundary was set along the north side of Whitehall Road to keep development out of the Slab Cabin watershed. Specific provisions of the 2000 Comprehensive Plan also identified the parcel as an agricultural area, and allocated existing parcels within Ferguson Township and across the region to meet expected student housing demand without compromising the recharge area.

In August 2006, the State College Borough Water Authority and Clearwater Conservancy purchased 423 acres of forested land in Musser Gap, another key part of the groundwater recharge area, to protect it from a proposed residential development. At that time, the water authority conducted dye-trace testing in the area, and found that in high flow conditions, it took only two days for dye to reach the wells.

The following year, the water authority commissioned a Source Water Protection Report, which presented further evidence that the Slab Cabin watershed is a crucial drinking water recharge area in need of strong protections.

On June 9, 2008, Penn State sold 59 acres upstream of the parcels proposed for housing and park development to the water authority for \$383,500 (\$6,500 per acre). The SCBWA parcel is protected with deed restrictions based on the groundwater recharge role of the land, requiring that "...the Property shall remain in an undeveloped state or used...for agricultural, passive park, conservation area, preserve or wetland uses, to include unpaved roadways and walkways."

In 2013, the COG published the 2013 Centre Region Comprehensive Plan, updating the 2000 Comprehensive Plan, maintaining land use goals to protect agricultural areas, and redrawing the 2000 Regional Growth Boundary to encompass the Penn State housing development parcel rezoned R-4 in 2004 against regional recommendations. (Details below.)

In Fall 2014, RK Mellon Foundation gave a \$250,000 grant to ClearWater Conservancy for two years of streambank restoration projects. At the time, ClearWater board president Steve Miller was also a member of the Ferguson Township Board of Supervisors, which was then beginning its review of the Penn State/Toll Brothers student housing application. By March 2015 – when the supervisors voted on the tentative housing plan, Miller was serving as the interim executive director of ClearWater and still a Ferguson supervisor. Throughout the housing development review process, ClearWater made no public effort to stop the project as a threat to public drinking water supplies.

In May 2015, Steve Watson, a Penn State planner, was also serving as chairman of the Centre Regional Planning Commission (CRPC). At the May 7 meeting, Bob Hoffman, College Township CRPC representative and the commission's liaison to the water authority, reported on general SCBWA concerns about drinking water endangerment. Like ClearWater Conservancy, the CRPC

made no public moves to stop the proposed land development projects as incompatible with regional planning frameworks and sourcewater protection.

Throughout the process – dating back to at least the 2004 rezoning – the water authority was not consulted about the impacts of development on water quality. As water board member Jeff Kern put it at a July 2015 joint meeting of the water authority and the Ferguson supervisors: "I don't think any of us would have recommended that it be zoned as it is now, back in [2004] when it was rezoned. I think that we would follow the recommendations that were just presented as a Zone 2 [DEP-designated sourcewater] area, and said that was just the wrong thing, to rezone that property [for high-density housing.]"

The water authority presented a draft wellhead protection overlay ordinance to Ferguson Township at the July 2015 meeting – now being developed by staff for consideration by the supervisors. But to date, Kern's comments are the closest the water authority board and staff have come to taking a clear public stand against land development activity in the remaining undeveloped land in the Slab Cabin watershed.

Partly driven by the community concerns about land development impacts on drinking water raised during the housing development fight, the Ferguson Township staff and supervisors also worked between January and June of this year to draft a new township stormwater management ordinance, unanimously approved June 6. The new ordinance replaces an outdated version and brings the township into better compliance with updated state regulations. The new ordinance applies to all land within Ferguson Township that is also within Zone 2 drinking water recharge areas (roughly 60% of township land), and establishes 50-foot setback distances for stormwater infiltration basins from critical geological features such as sinkholes and bedrock outcropping.

### "The Cottages" Luxury Student Housing Development

Despite the 2000 comprehensive plan, in November 2003, Penn State applied to Ferguson Township to rezone part of their land, outside the growth boundary, from Rural Agricultural (RA) to high-density Multifamily Residential (R-4), to expand the Regional Growth Boundary past the north side of Whitehall Road; and to amend the Centre Region Act 537 Plan to extend sewer service from the University Area Joint (Sewage) Authority into the new development tracts. Ferguson Township supervisors agreed to consider the request and forwarded the proposal to regional planners for review.

Between March and September 2004, Centre Region Planning Agency (CRPA) staff and the Centre Region Planning Commission (CRPC), comprised of representatives from the six municipalities, recommended denial of Penn State's application, in order to uphold the regional planning framework, keep the growth boundary intact and protect the drinking water and farmland.

However, on Sept. 7, 2004, the supervisors voted 3-2 to approve Penn State's request and change the zoning of the

26-acre parcel from RA to R-4. One of the “Yes” votes came from Ferguson supervisor Dick Mascolo, spouse of Parks Authority chairwoman Sue Mascolo.

As a result, in 2011, Penn State opened the proposal process for the high-density development of the land for student housing. Later in 2011, Toll Brothers were selected as developers, and Penn State officials had at least one meeting with Toll Brothers representatives to discuss an “investment offering memorandum” for the Whitehall Road residential development.

In May 2012, the Penn State Board of Trustees approved the sale of two Whitehall Road parcels, a total of 40.39 acres, to Toll Brothers subsidiary Springton Pointe LP, for \$13.5 million. At the time, Karen Peetz was serving as chairwoman of the board of trustees and vice chairwoman of BNY Mellon, and BNY Mellon was the seventh-largest shareholder in Toll Brothers corporation.

As planning continued, the developers requested 5.5 additional acres be subdivided from an adjacent RA parcel owned by Penn State, but sitting outside the Regional Growth Boundary, for stormwater management. The trustees approved that addition to the deal in September 2013, for a total sale of roughly 46 acres, at about \$293,478 per acre.

The developers worked on preliminary planning during 2013 and 2014. Ironically, on Nov. 18, 2013, the University Area Joint (Sewage) Authority shared a Ferguson Township meeting with Toll Brothers. UAJA presented information about limits to regional sewage treatment capacity due to increased population, and Toll Brothers presented a plan for an apartment and townhouse mix with 1,544 student beds.

On Oct. 1, 2014, Penn Terra Engineers submitted Tentative PRD Plan and attachments to Ferguson Township for review to build 268 units and extend Blue Course drive into the watershed by August 2016. The 1,093 beds in the complex would rent between \$500 and \$900 per bed per month. Annual anticipated rental income to Toll Brothers and investors, at an average \$750 per bed, was \$9,837,000.

The project was designed to include large stormwater detention basins on the 5.5 acres of land inside the Township’s agricultural district, and outside the Regional Growth Boundary, in violation of Ferguson Township zoning laws and regional planning protocols, via subdivision. Multiple reviewers examined the plan and flagged these violations along with threats to drinking water safety; stormwater runoff, sedimentation and erosion control problems; karst limestone and bedrock subsurface geology sinkhole risks; and erosion of the regional land use planning framework.

Two reviews were particularly important, and later formed the foundation for the successful land use appeal. On Jan. 29, 2015, CRPA planner Autumn Radle sent a letter to Maria Tranguch, then-Ferguson Township Planning & Zoning Director, regarding the proposed lot consolidation plan, noting concerns that the proposal to include 5.5 acres for stormwater management facilities was inconsistent with the “goals and objectives and intent of the 2013 Centre Region Comprehensive Plan,” because it

lies outside the Regional Growth Boundary and Sewer Service Area, will retain Rural Agricultural zoning without meeting the minimum 50-acre threshold, and violates Land Use goals 7 & 8 for “protection of agricultural areas to maintain their future agricultural use.” Radle concluded: “...allowing developers to build facilities, calculate density, and satisfy open space requirements using parcels outside the RGB and SSA sets an undesirable precedent that erodes the integrity of the RGB and SSA.”

Reinforcing Radle’s conclusions, on Feb. 19, 2015 Tranguch sent her own memo to supervisors, emphasizing that the stormwater management parcel, zoned RA, couldn’t be rezoned directly to “Planned Residential Development” under local ordinances, and that it couldn’t legally house stormwater management facilities to support high density housing in the adjacent R-4, because high-density development is not allowed on agricultural land. Tranguch highlighted risks to SCBWA water wells, and recommended disapproval “due to the inconsistencies with best efforts to effectively plan and zone within the Township.”

On Feb 23, 2015, the Ferguson Township Planning Commission and community members discussed concerns about water contamination, and the Planning Commission split 3-3 on a motion to recommend supervisor approval of the tentative plan and move the process forward into the final review phase.

On March 2, 2015, the supervisors ignored the legal and public health issues raised by the team of reviewers, and approved the plan by a 3-1 vote, with one member absent. A week later, the *Centre Daily Times* published a story on odor problems at the UAJA wastewater treatment plant in College Township, which Executive Director Cory Miller attributed to increased sewage from increased housing development and increased population.

Following the tentative approval on March 2, residents across the region mounted a vigorous public campaign against the development, appearing at public hearings before municipal and water boards, and at Penn State Board of Trustees meetings, and putting up a slate of candidates for the fall elections. On Nov. 3, Ferguson voters elected the water slate to replace three of the pro-development supervisors, effective with the January 2016 swearing in.

By Nov. 9, the Ferguson Township Planning Commission was persuaded by the evidence presented about risks to the water supply and farmland, and voted unanimously to recommend that the supervisors disapprove the final plan. However, on Nov. 16, the supervisors ignored public concerns, the election results, the Planning Commission recommendation and a letter from attorney Jordan Yeager urging them to vote “No” on multiple legal grounds, including those highlighted by Radle and Tranguch. Instead, the supervisors voted 4-0 to approve the plan, with one member absent.

Nittany Valley Water Coalition plaintiffs, represented by Yeager, filed a land use appeal on Dec. 16, 2015, under the PA Municipalities Planning Code, asking the Court to overturn the Township approval of the plan. Plaintiffs argued that the final plan violated one of the conditions of

the tentative plan (compliance with local ordinances) and two zoning ordinances related to stormwater management and allowable uses in agricultural districts; that the supervisors did not have the authority to nullify those zoning ordinances; and that the improper attempt to circumvent Township ordinances governing land use was an abuse of discretion.

On July 18, 2016, Judge Jonathan Grine of Centre County Court of Common Pleas ruled in favor of the plaintiffs, reversing and vacating the supervisors' approval. Toll Brothers appealed the Grine ruling to Commonwealth Court, where review is now pending.

On Sept. 8, during discussion at a joint meeting of the COG Parks Capital Committee and the Parks Authority, Margaret Gray, Penn State Director of Local Government and Community Relations, and spouse of David Gray, Vice President for Finance & Business, confirmed that Penn State still owns the land proposed for development of the housing and the access road.

### Whitehall Road Regional Park Development

On Nov. 27, 2006, Ferguson Township, College Township, Harris Township, Patton Township and State College Borough entered into "Joint Articles of Agreement for the Planning, Development and Operation of Regional Parks" through COG. The municipal representatives also approved "Joint Articles of Agreement for the Ownership of the Whitehall Road Regional Parklands." (Halfmoon Township, although a member of COG, does not participate in the regional parks program.)

The agreements required that both the master plan for the Whitehall Road Regional Park, and any amendments to the plan, be approved unanimously by the General Forum.

On May 30, 2008, Penn State sold COG the first of two parcels of land for the park. Funding for the purchase of these 75 acres was supplied by a PA Department of Conservation and Natural Resources grant, and from Ferguson Township municipal funds. According to the parks authority project timeline online, in 2005, the land was appraised at \$15,000 per acre; Penn State sold the land to COG at \$3,077 per acre. In May 2011, COG and Ferguson Township jointly bought the second, 25-acre parcel from Penn State, bringing the total to 100 acres.

On Aug. 23, 2010, the COG General Forum members unanimously approved the original Whitehall Road Regional Park Master Site Plan & Report. Phase 1 was to include grading, erosion and sediment control, and stormwater management for the 75-acre parcel; installation of crushed stone parking areas, 8 rectangular sport fields and one rectangular practice field, 1 baseball field, a playground area, a basketball court, a large community pavilion, one set of restrooms with flush toilets and concession stand, a perimeter trail and interior walkways and a new Centralized Parks Maintenance Facility.

From the start, a key component of the Whitehall Road Regional Park Plan was that the adjacent housing developer, selected by Penn State, would pay for the

installation of an access road to the landlocked park parcel, including water service; sewer service with a pump station to pump sewage uphill roughly a mile along Whitehall Road to the nearest gravity line at Stonebridge Drive; electric and telecommunications service; and stormwater management.

In June 2011, confident that the housing development would move forward, the Parks Authority borrowed \$7,578,800 from Fulton Bank, with municipal guarantees, to plan and build Oak Hall Regional Park Phase 1, and Whitehall Road Regional Park Phase 1. Of the total borrowed, roughly \$5.2 million was designated for the Whitehall Road park.

On Oct. 3, 2011, Ferguson Township, COG and the Parks Authority entered into a 50-year lease agreement for the 100 acres at Whitehall Road (approved by the General Forum on Sept. 26, 2011). The park land is now jointly owned by the Centre Region COG and Ferguson Township, leased to the Parks Authority.

In February 2013, the General Forum was asked to approve four changes to the master plan, including adjusting the footprint of a proposed "field sports building," showing a possible CRPR Agency Headquarters Building, and showing more landscape buffers, stormwater provisions and building coverage calculations. The changes were unanimously approved.

Municipalities have been paying off the principal since March 2013, and the loan has been refinanced several times, with a current drawdown date of June 1, 2017, meaning that the funds must be spent or returned by that date.

Since March 2013, the Whitehall Road park project has been in limbo, awaiting the start of the adjacent housing development for the access road. The housing development is also in limbo, pending the outcome of the Toll Brothers' appeal to Commonwealth Court.

As the Parks Authority watched the litigation unfold, its governing board decided in March 2016 to refer the related park planning issues to a consultant to report on feasibility of options in case the court ruled against the housing developers and thereby eliminated the planned funding source for the access road.

The feasibility report, and the regional public discussion about its implications, will be covered in the Sept. 16 edition.

DISCLOSURE: I was active in the public information campaign during the effort to get the supervisors to deny the final PRD, and I am a plaintiff on the Nittany Valley Water Coalition land use appeal.

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KW INVESTIGATIONS LLC  
156 W. Hamilton Ave.  
State College PA 16801  
(814) 237-0996