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Nittany Valley Environmental Coalition incorporating, preparing lawsuit challenging Penn State's tax exemptions. (Press Release for NVEC)

By Katherine Watt

The Nittany Valley Environmental Coalition (NVEC) is preparing to file a lawsuit in January, seeking court review of Penn State's nonprofit and public/private status, property tax exemptions, and fiduciary obligations regarding Commonwealth natural resources. The suit will be filed if Penn State's leadership fails to negotiate a land swap with student housing developers before a 2012 sales contract for Whitehall Road parcels closes later this month or early next year. NVEC remains willing to negotiate.

The Nittany Valley Water Coalition (NVWC, which is in the process of incorporating as the non-profit Nittany Valley Environmental Coalition) formed in late 2015 to challenge the Ferguson Township Board of Supervisors approval of the land development plan under the provisions of the Pennsylvania Municipalities Planning Code. Although Centre County Court of Common Pleas Judge Jonathan Grine vacated the supervisors' approval in a July 2016 ruling on substantive grounds, remanding the case for further township review, Grine's decision was overturned on a procedural technicality by the Commonwealth Court in May 2017 and in November 2017, the Supreme Court declined to hear an appeal brought by the water coalition.

At stake is the safety and quality of the State College area's public drinking water supply; the community's two main wellfields are located nearby and downslope of the proposed student housing development, in a rural agricultural area with fragile karst geology, many fractures and sinkholes, and thin soils unsuitable for filtering runoff from intensive development.

BACKGROUND

For brief background, the water coalition proposed alternative PSU-owned land to Toll Brothers during the Summer 2017 citizen occupation of the Whitehall Road site. Penn State officials raised no objections to the alternatives assessment; Toll Brothers looked at the sites and selected one parcel along West College Avenue near Blue Course Drive for feasibility studies. On Oct. 31, Toll Brothers submitted a "letter of intent" to Penn State, indicating an interest in moving their escrowed deposit for the Whitehall Road site to a purchase of the alternative site on W. College.

NVWC subsequently proposed a mediation to work out the land swap details among Toll Brothers, Ferguson

Township (involved in zoning and permitting the alternative site), Penn State administrators, and water coalition representatives. To date, Penn State Vice President for Finance and Business David Gray has refused to participate in mediation, and refused to consider Toll Brothers' offer on the alternative site.

CONSTITUTIONAL CHALLENGE

The new lawsuit will be a constitutional challenge, not a regulatory challenge under the Municipalities Planning Code, and will ask the courts to rule that Penn State is a Commonwealth trustee with fiduciary obligations to protect public resources under the state Environmental Rights Amendment (Article 1, Section 27 of the Pennsylvania Constitution), which was ratified by a four-to-one margin by state voters in May 1971, in response to centuries of environmental degradation and costly mitigation of industrial deforestation, unregulated hunting and mining pollution.

NVEC will ask the courts to apply the state Supreme Court's June 20, 2017 ruling in *Pennsylvania Environmental Defense Foundation v. Commonwealth* to Penn State's actions. *PEDF v. Commonwealth* found that the Environmental Rights Amendment ("ERA") created an enforceable trust imposing a fiduciary duty on all Commonwealth state and local agencies to protect public natural resources.

In the alternative, if the courts find that Penn State is not a state agency with fiduciary obligations under the ERA, but that it has, through its real estate transaction history and other actions - transformed itself from a public, land grant institution into a fully private, non-governmental corporation, the coalition will ask the courts to strip Penn State of its tax exemptions and other public subsidies.

"We'll be striking at the root of Penn State's hybrid legal status that has allowed it to become a tax-exempt, publicly-subsidized, privately-governed, for-profit corporation," said NVEC President Kelli Hoover.

The case will further give the courts an opportunity to apply the *PEDF v. Commonwealth* decision to another series of court decisions about Penn State's taxability under Article VIII, Section 2 of the Pennsylvania Constitution related to tax exemptions for governmental and nonprofit entities and related legislation, including the 1997 Institutions of Purely Public Charity Act.

Two key case are often referred to as "Penn State I" and "Penn State II."

In *Penn State v. County of Centre*, (1992) ("Penn State I"), the Supreme Court discussed, but didn't decide, whether Penn State still qualified as an agency of the

Commonwealth. The issue in that appeal was whether the doctrine of issue preclusion prevented the trial court from determining PSU's status, since, in 1939, the Centre County court had ruled that Penn State was a state agency. Remanding the case for further county court review, the Supreme Court agreed with the appellants, Centre County Commissioners, that "significant changes in the factual circumstances of the University's relationship with the Commonwealth and in the property's uses have occurred in the last 50 years."

In *Penn State v. Derry Township School District and the County of Dauphin* (1999) ("Penn State II"), the Supreme Court ruled that Penn State no longer qualified for property tax exemption as "an instrumentality of the state," because the legislature no longer controlled governance of the institution through a majority of the Board of Trustees and state and federal support were no longer a majority of funding (outweighed by private tuition payments). The Supreme Court then remanded the case back to the Dauphin County Court of Common Pleas to decide whether Penn State qualified for local real estate tax immunity as a "purely public charity" under Article VIII, Section 2(a)(v) of the Pennsylvania Constitution and the five-part analysis test established by the Supreme Court in 1985 through *Hospital Utilization Project v. Commonwealth*, often referred to as the "HUP" test.

After that review, the Dauphin County court in 2000 ruled that neither Penn State University nor the Milton S. Hershey Medical Center qualify as purely public charities, because neither operate "entirely free from private profit motive." At this point in our research, we believe that Penn State entered into "payment in lieu of taxes" or "PILOT" agreements with counties, municipalities and school districts across the state, paying taxes on only a fraction of the value of University land and buildings.

As cited in another property tax exemption case in 2013 (*City of Philadelphia v. Cumberland County Board of Assessment Appeal*), the Supreme Court's rulings in Penn State I and Penn State II confirmed that the University's status is "not etched in stone," but rather subject to change in response to changed factual circumstances.

"Penn State has spent many decades carefully constructing a mixed status for the institution to internalize benefits and externalize costs, and to evade public accountability and compliance with laws that apply to public or nonprofit entities," said Hoover. "We believe it's vulnerable because of that complexity, which has created too many contradictions to be sustained for much longer in an era of increasing public interest in protection of critical natural resources and tightening public budgets."

"We are thinking of our lawsuit as 'Penn State III,'" explained Hoover. "It challenges Penn State's property tax

exemptions and PILOT agreements, through the lens of the University's record of buying ecologically-sensitive farmland at artificially low prices (or accepting land donations), holding the land as tax-exempt while upzoning to increase its sales value, and then selling it for massive profit and risky development, exemplified by the Whitehall Road land deal."

"For us, this suit attacks one of Penn State's core weaknesses," said Katherine Watt, NVEC Vice-President. "As a quasi-public, quasi-private corporation, it evades both public accountability through public elections of trustees, transparent, due-process decision procedures, and compliance with state Right to Know and ethics laws, and private corporate accountability through share issues, purchase and sale of shares by shareholders, and shareholder elections of governing directors."

The case could have wide implications across the state for cash-strapped counties, municipalities and school districts, and - if the court rules Penn State is a fully private corporation subject to standard corporate property taxation - this could spur the creation of local trust funds from the tax revenues collected, to be used for proactive natural resource protection and for restoration projects after environmental damage has occurred.

Penn State's opaque, profit-driven real estate transactions may also have federal implications under the 14th Amendment, if the university is found to be an agency acting under color of state law to deprive Pennsylvania citizens of enforceable environmental rights under Article I, Section 27 and the related local Community Bill of Rights adopted by State College citizens in 2011 and Ferguson Township voters in 2012, and/or deny other private property owners across the state the same access to "PILOT" agreements reducing their tax burdens to a small fraction of what they now pay.

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KW INVESTIGATIONS LLC
156 W. Hamilton Ave.
State College PA 16801
(814) 237-0996
kw.investigations.llc@gmail.com
steadystatecollege.wordpress.com