

BAILIWICK NEWS

Reporting and critical analysis of Centre County public affairs

March 9, 2017

Whitehall Road Regional Park planning and financing as a case study in regional governance (Continuation of a series)

By Katherine Watt

INTRODUCTION – COG STRUCTURE

Just as the Internet was once infamously described as a “series of tubes,” the Centre Region Council of Governments (COG) can be thought of as a series of intergovernmental agreements – legally binding contracts written between two or more municipal legislatures laying out the terms under which joint projects are to be conducted. The contractual exchange is generally money for services: the municipal governments pledge their tax revenue to obtain regional services including fire protection, library services, code inspections and park programming.

COG was established with general articles of agreement in 1969, when the regional population was about 53,000, according to the crcog.net data center. Those articles of agreement have been updated from time to time in the intervening 48 years, most recently in December 2008. Under the agreement, COG uses a set of seven committees to review proposed programs and policies and make recommendations to the General Forum for adoption and/or referral to municipal legislatures for legally binding ratification. Sometimes ratification votes occur at regularly scheduled municipal meetings between monthly General Forum meetings, but sometimes ratification votes occur during unit vote “recesses” of the monthly General Forum meeting, after which General Forum reconvenes to conduct further business.

COG programs are provided for a regional population of roughly 93,000 people living in six municipalities covering about 150 square miles, as of the 2010 federal census. Penn State University, which is not a municipality, and in many cases functions as a private land development corporation, contributes minimally to COG budgets, but has seats on some COG committees.

Apart from the specific terms of written contracts, the COG has no taxing or policy-making power. The power exercised by the COG General Forum is entirely derivative. It comes from the power held by elected municipal legislators as the governing bodies of their six respective boroughs and townships.

The COG funding formulas used to apportion contributions by population exclude individuals between the ages of 18 and 24. The data in the table on the next page is drawn from the 2017 COG budget, using 2015

census figures, for a total tax-base population of 56,130: roughly 60% of the actual regional population. The other 40% – or about 36,870 people – are predominantly Penn State students between the ages of 18 and 24 living off-campus.

The COG Parks Capital and Finance committees are the two most relevant committees to the current Whitehall Road Regional Park (WRRP) public debates, although the Transportation & Land Use, Public Safety, and Public Services & Environmental committees are implicated as well.

The Centre Regional Parks & Recreation Authority (Parks Authority), however, is not a COG committee. It’s a quasi-independent municipal authority comprised of representatives from municipal park advisory boards who are appointed by municipal legislatures.

REGIONAL PARK FUNDING & COG GENERAL FORUM

Prior to Oct. 13, 2016 there were three publicly-expressed possibilities for the remaining roughly \$4.7 million held in Fulton Bank accounts for Whitehall Road park design and construction.

First, the Parks Authority board could move quickly through studies, easement negotiations, permitting and design to sign construction contracts based on the original approved master plan, before the June 1, 2017 drawdown date for the loan.

Second, the Parks Authority could go to the General Forum requesting 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. During public discussions, COG Finance Director Joe Viglione said that Fulton Bank would have to make a business decision regarding that application. The bank could refuse the request, or raise the interest rate on the loan.

Third, the General Forum could vote to close out the loan and municipal guarantees, leaving taxpayers responsible only for paying down the rest of the debt incurred by completed work at Oak Hall Regional Park and Hess Field.

On Oct. 13, however, at the joint COG Parks Capital/Parks Authority meeting, 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.

2017 MUNICIPAL LEGISLATORS <i>Listed in order of non-student population</i>	COG GENERAL FORUM	2017 COG ADVISORY COMMITTEES <i>Listed in order of monthly meeting cycle</i>
Ferguson Township Supervisors – 5 Miller, Buckland, Whitaker, Dininni, Graef Meets 1 st and 3 rd Mondays 2015 Pop. w/o students: 16,188	32 voting members Abrams (P); Barlow (SC); Bernier (C); Brown (SC); Buckland (F); Daubert (SC); Dauler (SC);	Transportation & Land Use Luck (P); Lafer (SC); Lyncha (C); Whitaker (F); Kirsten (HM); Harden (H); Cooper (PSU) Meets 1 st Mondays
State College Borough Council – 7 Daubert, Dauler, Myers, Lafer, Brown, Barlow, Engeman Meets 1 st and 3 rd Mondays 2015 Pop. w/o students: 13,362	DelCorso (HM); Dininni (F); Downsborough (P); Engeman (SC); Fragola (C); Francke (C); Graef (F)	Human Resources Wilson (H); Whitaker (F); Brown (SC); Fragola (C); Merritt (HM); Trevino (P) Meets 1 st Wednesdays
Patton Township Supervisors – 5 Abrams, Wise, Luck, Downsborough, Trevino Meets 2 nd and 4 th Wednesdays 2015 Pop. w/o students: 11,346	Graham (H); Haimeister (H); Harden (H); Kirsten (HM); Lafer (SC); Lord (H); Luck (P); Lyncha (C); Merritt (HM); Miller (F);	Public Services & Environmental Hameister (H); Stilson (C); Barlow (SC); Spencer (HM); Luck (P); Buckland (F) Meets 1 st Thursdays
College Township Council – 5 Francke, Bernier, Stilson, Lyncha, Fragola Meets 1 st and 3 rd Thursday 2015 Pop. w/o students: 7,500	Myers (SC); Spencer (HM); Stevenson (HM); Stilson (C); Trevino (P); Whitaker (F); Wilson (H); Wise (P)	Public Safety Wise (P); Wilson (H); Dauler (SC); Dininni (F); Lyncha (C); Stevenson (HM); Brachbill (Bellefonte); Bittner (PSU) Meets 2 nd Tuesdays
Harris Township Supervisors – 5 Haimeister, Graham, Wilson, Harden, Lord Meets 2 nd Monday 2015 Pop. w/o students: 5,173	Meets 4 th Mondays	Finance Graham (H); Francke (C); Myers (SC); Miller (F); Kirsten (HM); Downsborough (P) Meets 2 nd Thursday
Halfmoon Township Supervisors – 5 DelCorso, Kirsten, Stevenson, Spencer, Merritt Meets 2 nd and 4 th Thursday 2015 Pop. w/o students: 2,561		Parks Capital Daubert (SC); Stilson (C); Graef (F); Trevino (P); Lord (H) Meets 2 nd Thursday
		Executive Daubert (SC); Francke (C); Miller (F); DelCorso (HM); Abrams (P); Lord (H) Meets 3 rd Thursday

General Forum Loan-Related Votes

During the first few weeks of February, I did a close read through the available COG General Forum minutes for 2011 through 2016, looking for the record of how Fulton Bank loan renegotiations have been handled in the past by the General Forum.

The key documents include the 2006 Articles of Agreement governing the development of the regional parks, the 2010 WRRP Master Plan (projecting a total cost of about \$13 million for full build-out), the 2011 Fulton Bank loan contract, and General Forum minutes.

On Nov. 27, 2006, five Centre Region COG municipalities – State College, Ferguson, Patton, College and Harris – entered into Articles of Agreement for the “Planning, Development and Operation of Regional Parks.”

Halfmoon Township supervisors decided not to participate in the regional parks program, and so have abstained from all further votes on the program.

Section 7.3 of the contract stated: “Proposed

expenditures for Regional Parks Capital Projects shall be determined each year as part of the COG Budget process. The Participating Municipalities may authorize a committee...to recommend an annual appropriation.”

The COG Parks Capital Committee was later established to fulfill that responsibility.

Section 7.5 stated: “During 2008, the [COG Parks Capital] Committee will review funding...Said committee shall propose a funding method to finance these improvements. **This funding method shall require the unanimous approval of the Participating Municipalities at a regular scheduled General Forum meeting.**” (Emphasis added.)

Other sections of the 2006 regional parks contract/agreement required unanimous approval of all construction contracts and unanimous approval of all Master Plan changes. The section on construction contracts has not been enforced for any construction contracts executed to date for the Oak Hall and Whitehall Road regional parks and, under one legal interpretation, may be unenforceable, to the surprise of at least the

Patton Township supervisors, as covered in previous *Bailiwick News* reports.

There have also been several General Forum votes to amend the Whitehall Road Regional Park Master Plan; those votes are not covered in this report but may be covered in future reports.

In August 2010, the CROCOG General Forum unanimously approved the WRRP master plan.

The master plan stipulated that flush toilets had to be available in the first phase of construction (p. 94) and that the proposed centralized maintenance facility should be constructed in Phase 1. The master plan did not include budget line items for a paved access road, a sewage pump station, or installation of water and sewer lines and off-site traffic intersection improvements, because park advocates presumed those would be built by the adjacent housing developer.

The master plan did, however, include a provision that regional funding might be used to build a temporary gravel access road from Whitehall Road to the park entrance, if the adjacent student housing development were delayed for any reason. (2010 plan p. 26 and budget pp. 87-88).

Since the General Forum master plan vote in August 2010, there have been six key General Forum votes on regional park funding between April 2011 and Nov. 2015, including one vote possibly changing the legal relationship between the Centre Regional Recreation Authority (the former name of the Parks Authority) and the Centre Region Council of Governments.

Loan Vote 1 – April 2011

The first loan-related General Forum vote occurred on April 25, 2011. Prior to that meeting, the COG Finance Committee reviewed a bid from Fulton Bank for a 20-year \$7,578,800 loan to finance Phase 1 construction of Oak Hall Regional Park and Whitehall Road Regional Park.

On the Finance Committee's recommendation, the COG General Forum then approved Resolution 2011-5, authorizing entry into the "Participation Agreement."

According to the minutes, Fulton Bank was the sole bidder for the loan. Jens Damgaard, a tax-exempt finance attorney with Rhoads and Sinon, LLP, presented a set of loan documents to the General Forum. There were no citizen comments on the issue, and the meeting chairman – State College Borough Councilman Ron Filippelli – "recessed the General Forum meeting at 8:00 p.m. so that the participating municipalities and the [Centre Region Recreational Authority] could convene meetings of their own."

The minutes continued: "At 8:07 p.m. the General Forum meeting was reconvened and the recording secretaries for the municipalities of College Township, Ferguson Township, Harris Township, Patton Township, and State College Borough each reported approval of a guaranty agreement, participation agreement, and municipal ordinances to incur 'Lease Rental Debt' in

SIDEBAR - November 2008 Survey Results

In November 2008, the Centre Regional Recreation Authority published the results of a survey measuring citizen interest in regional parks.

A key finding of that report was in Question 5: "Are you satisfied with the park facilities in the Centre Region currently available to members of your household?"

Of 1,037 responses received via Web and paper surveys, 74% said "Yes," and 26% said "No."

Respondents elaborated on their views in responses to Question 8: "As we plan for two new regional parks, what other suggestions or comments would you like to share with us?" Among dozens of suggestions for park features, nine comments succinctly captured the "no more parks" position:

- "Don't do it."
- "We are already well equipped, why more?"
- "No new taxes please...cost of living is significant, especially to retirees."
- "Do not do the parks, instead give the money to the police to stop the drug selling that goes on in the park area."
- "Instead of the parks, give the money to make my taxes lower, save money do not cost the tax payer more money in making a park that is not necessary."
- "Stop planning. Save the money and apply it to useful services or return it to the taxpayers."
- "There are already plenty of parks and there is no need for additional facilities."
- "Do not do it."
- "We don't need more tax-free property!"

Despite this key finding – that regional taxpayers did not want to purchase new regional parks by a 3-1 margin – planning and public spending for the regional parks went ahead. This raises the question: "How can the No-More-Parks majority be represented in the decision-making venues?"

specified amounts."

The minutes further stated: "Sue Mascolo, [CRRA] Chair, reported that the Authority adopted Resolution 02-2011 that approves all loan documents necessary for the transaction."

Upon reconvening, the full General Forum then adopted Resolution 2011-5, to formalize the contract by "adopting" the participation agreement and "authorizing" the execution of the legal documents. The vote was unanimous (24-0-3), as required by the articles of agreement governing the regional parks program.

Loan Execution

On June 1, 2011, the Fulton Bank loan documents were executed. Through the contracts, the Centre Regional Recreation Authority borrowed \$7,578,800 from Fulton Bank, collateralized by the taxing authority of

State College, Ferguson, Patton, Harris and College governments, to plan and build Phase 1 of Oak Hall Regional Park and Whitehall Road Regional Park.

The “drawdown” date listed in the original contract was June 1, 2013. Of the total borrowed, roughly \$4.8 million was designated for Phase 1 of WRRP, to be combined with a \$300,000 DCNR grant for a total Phase 1 budget of roughly \$5.1 million.

At the time the parties signed the contracts, they were confident that an adjacent student housing development to be built on Penn State-owned land would move forward, providing funds to construct a shared access road and utility hookups for electricity, water and sewer for the planned Whitehall Road park.

Section 3.04 of the loan contract stated: “The Authority shall have the right at any time, **at the direction of the COG**, to prepay without premium or penalty of any kind, all or any portion of the outstanding principal balance of the Authority Bond.” (Emphasis added.) Section 7.01 of the loan contract transferred the collateral security – the taxing authority of the municipalities – from the Parks Authority to Fulton Bank.

Loan Vote 2 – November 2011

The second regional parks loan-related General Forum vote occurred on Nov. 28, 2011. Resolution 2011-11 “recommended” the Centre Regional Recreation Authority “enter into a modification agreement for the loan to fund the development of regional parks subject to final approval by Fulton Bank,” and subject to confirmation by the COG Parks Capital Committee, to extend the drawdown date for the loan from 2013 to June 1, 2014.

The municipal representatives in attendance that night approved Resolution 2011-11 unanimously as required by the articles of agreement, by a vote of 21-0-2 (again, Halfmoon abstaining). The municipalities did not recess into unit meetings during the General Forum meeting to obtain a majority vote of each constituent board.

Loan Vote 3 – December 2012

The third regional parks loan-related General Forum vote occurred on Dec. 18, 2012. Resolution 2012-7 “authorized” the Centre Regional Recreation Authority to work with COG staff and Fulton Bank staff to renegotiate the loan terms to obtain a lower interest rate on the debt.

The municipal representatives in attendance that night approved Resolution 2012-7 unanimously as required by the articles of agreement, by a vote of 22-0-3 (Halfmoon abstaining). The municipalities did not recess into unit meetings during the General Forum meeting to obtain a majority vote of each constituent board.

Loan Vote 4 – February 2013

A fourth regional parks-related General Forum vote occurred on Feb. 25, 2013. This one was a bit different, and was not specifically related to the loan collateralization, but may have had legal ramifications related to the loan.

At that February 2013 General Forum meeting, then-Centre Region Parks and Recreation Director Ron Woodhead reported that the Centre Regional Recreation Authority was asking the General Forum to refer a draft resolution to the individual municipalities for adoption, “authorizing” a merger with the Centre Region Parks & Recreation Board, and renaming the new hybrid entity the Centre Region Parks & Recreation Authority, arguing that membership on both committees was the same.

Woodhead said Solicitor Terry Williams had prepared a model resolution for the municipalities to use. Although no resolution number is included in the minutes, the General Forum voted to “receive a model Resolution” from Williams, “transfer” the responsibilities of the Centre Region Parks and Recreation Board to the renamed Authority; and “recommend” that the participating municipalities approve the Resolution at their municipal meetings and then send executed copies to COG Executive Director Jim Steff by May 7, 2013 for distribution to the Centre Region Parks and Recreation Authority.

At that time, according to the minutes, Patton Township Supervisor Elliot Abrams “expressed concern that transferring the responsibilities of the Board to the Authority could affect the elected officials’ control over the Parks and Recreation program, noting that the Board and Authority were purposely kept separate when originally formed.”

Woodhead replied that: “the two entities have been comprised of the same members throughout its history, each with a different function.”

Dick Mascolo, then-Ferguson Township supervisor chair, and husband of recreation authority chairwoman Sue Mascolo, “**observed that COG controls the funds**.” He noted that the reason an Authority was formed was to facilitate a non-profit status that could solicit grant monies. He expressed support for one entity.” (Emphasis added).

The General Forum vote in favor of the motion was reported as “26-0-3 with members from Halfmoon Township abstaining as they do not participate in the Parks and Recreation program.”

I haven’t yet tracked down all the minutes of the five municipal meetings at which this resolution was discussed, but the May 28, 2013 COG General Forum minutes report that all five municipalities approved the merger.

Specifically, I don't know if any municipal legislators ever considered or addressed the impact the merger and renaming might have on the legal relationships between the parties as outlined in the original Nov. 27, 2006 Articles of Agreement governing the regional parks program. That legal relationship is the flashpoint for the

current controversy around control of the regional parks construction program, given the changes in municipal legislators and project costs that have occurred over the last few years.

Loan Vote 5 – May 2014

The fifth regional parks-related General Forum vote occurred on May 27, 2014. The proposal was to modify the loan again, to extend the drawdown date from June 1, 2014 to Dec. 1, 2015, in response to ongoing delays for the adjacent student housing development on Penn State-owned land.

In response to questions from Patton Township Supervisor George Downsborough, COG Finance Director Joe Viglione explained that the loan could be prepaid.

However, Resolution 2014-1, unlike two of the previous three loan-related resolutions, did not contain the word "authorize." Instead, the General Forum voted on a proposal from the Finance Committee that they adopt Resolution 2014-1, which "recommended" that the Parks Authority enter into a modification agreement for the loan. The vote in favor was unanimous: 19-0-4.

Loan Vote 6 – November 2015

The sixth General Forum vote occurred on Nov. 23, 2015. Like the May 2014 resolution, Resolution 2015-4 did not contain the word "authorize." Instead, the resolution asked the General Forum to "recommend" that the Centre Region Parks and Recreation Authority enter into a modification agreement for the regional parks loan to extend the drawdown date from Dec. 1, 2015 to June 1, 2017.

"The motion was approved 18-1-4, **with Patton Township Supervisor Mr. Downsborough voting nay**" and Halfmoon Township supervisors abstaining. (Emphasis added).

In other words, the vote was not unanimous, and therefore didn't comply with the Nov. 27, 2006 articles of agreement; the current loan agreement between COG, the Centre Region Parks & Recreation Authority and Fulton Bank may be already void, as of Nov. 23, 2015 when Downsborough cast his "Nay" vote.

CRITICAL ANALYSIS

The specific funding question is: "Do the COG General Forum members have the legal power to delegate away their municipal taxing authority, by voting to 'recommend' transferring that authority to the appointed members of the Centre Region Parks and Recreation Authority?"

I believe the answer is "No."

Taxing authority is not transferrable.

The municipal legislators must vote at a General Forum meeting – and vote unanimously as individuals, not as units – to continue municipal tax-based guarantees for the regional parks construction program – or the funding mechanism is illegitimate.

It may already be illegitimate.

The Feb. 25, 2013 General Forum vote to merge the Parks Authority and the Parks Board in February 2013 may have been an unlawful attempt to transfer direct taxing authority from the elected General Forum members to the appointed Parks Authority board.

And the Nov. 23, 2015 General Forum vote may have been unlawful as a reauthorization of the borrowing, because it wasn't unanimous. George Downsborough voted "No."

In any case, the loan contracts make clear that the COG General Forum has the legal authority to *direct* the Parks Authority to pay off the loan early, if its constituent members regard that course of action as in the best interests of taxpayers (Section 3.04), and that *any* negotiations regarding payment of the loan must be conducted between Fulton Bank and the COG General Forum, not between Fulton Bank and the Parks Authority (Section 7.01).

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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

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