

# BAILIWICK NEWS

Reporting and critical analysis of Centre County public affairs

June 6, 2017

## The battle for the Slab Cabin Run watershed and the ecological and political future of the Centre Region community.

By Katherine Watt

Part 10A of 10-part series on water and farmland protection in the Slab Cabin Run watershed.

### INTRODUCTION

Laura Dininni and I co-authored a piece about the proposed Toll Brothers/Penn State student housing development, published in *Voices of Central Pennsylvania*, on April 1, 2015. We wrote:

“Scripted rollouts of these types of community-undermining projects are a depressingly common experience for municipal staff and elected officials, who have said that Penn State’s long-range plan is to fully develop more than 500 acres of university-owned land in the Slab Cabin Run watershed – traversed by an extension of Blue Course Drive between Whitehall

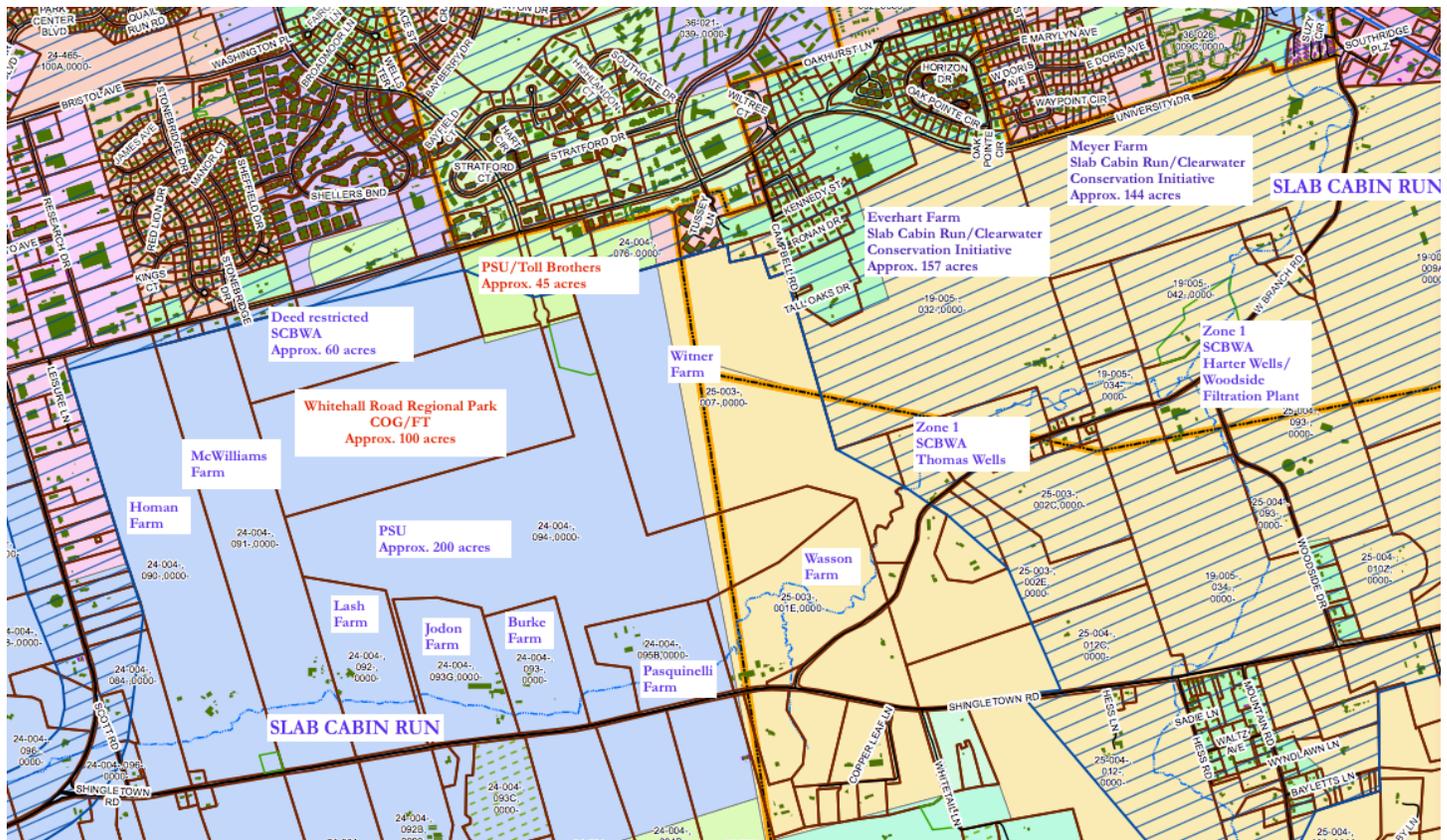
Road and Route 45. “The Cottages” is just the tip of the spear.”

From the beginning, the fight for water and farmland protectors has been to keep the first dominos standing by stopping the Toll Brothers student housing and the COG Whitehall Road Regional Park developments.

The map below shows how the two development threats– the Penn State/Toll Brothers student housing and COG park – would, if built, breach a key water and farmland protection boundary, and put the surrounding sourcewater ecosystem and farmland at high risk for intensive-use development.

On this map, readers can also see the two pieces of the ClearWater Conservancy Slab Cabin Run Initiative conservation campaign launched in October 2016: the Everhart and Meyer parcels in the upper right quadrant.

This tenth and final installment in the Slab Cabin Run watershed series begins with reporting on the 2007 land subdivision plan that created the link between the private student housing project and the public regional active sports park.



Map compiled with reference to a Centre County zoning map provided to Terry Melton in January 2017; 2004 State College Borough Water Authority Long Range Plan; 2007 SCBWA Sourcewater Protection Report; 2007-2008 Penn State/Sweetland Engineering subdivision plans on file with Centre County Recorder of Deeds; Nittany Valley Water Coalition’s January 2016 large-format area map, and ClearWater Conservancy’s October 2016 Slab Cabin Run Initiative map.

The next section provides a recap of the regional review and funding process for the park over the last year, focusing on April and May 2017 events, up through the June 3, 2017 launch of a citizen occupation of the Penn State/Toll Brothers site.

Part 10B, to be published later this week, will offer critical analysis of the issues.

### *2007 Sweetland Subdivision Plan – Forging the Link*

In June 2007, Sweetland Engineering produced a subdivision plan regarding five parcels of land comprising about 400 acres. The land to be subdivided included the R-4/multifamily residential land that had been rezoned by Ferguson Township in 2004 (by a 3-2 vote) at the request of landowner corporate Penn State, over the strong objections of regional planners and without review by independent hydrogeologists or the State College Borough Water Authority.

The area is traversed by an intermittent stream, riddled with sinkholes and sits upslope from the nearby Harter and Thomas public wellfields.

The Sweetland subdivision plan – combined with strategic subsequent land sales by Penn State – politically and financially linked the public park project to the private student housing development, to ensure that public officials would fight against community efforts to protect water and farmland, and in favor of private efforts to threaten water and destroy farmland, while corporate Penn State continued to occupy its weird semi-public, semi-private position, enjoying all the advantages of both classifications, while externalizing all of the costs.

The 2007 subdivision plan re-divided the five parcels into six new parcels.

The new Lot 2RRRR comprised about 200 acres lower down toward Slab Cabin Run, zoned Rural Agricultural. It is still being farmed, on lease arrangements with farmers working land owned by Penn State. As can be seen on the map, this parcel includes clear passage for an extension of Blue Course Drive from Whitehall Road to Shingletown Road.

The new Lots 3 and 4 comprised about 40 acres. This is the land now slated for the luxury student housing development, which has been under a sales contract from Penn State to “equity” owner Toll Brothers since 2012.

In 2013, a 5.5-acre portion of the 2RRRR parcel just below the student housing parcels and outside the Regional Growth Boundary was added to the Penn State sales contract, to be subdivided from the 2RRRR lot and used for stormwater detention basins supporting the adjacent high-density student housing.

The new Lot 5 contained about 60 acres, zoned Rural Agricultural, with frontage along Whitehall Road. This lot was sold by Penn State to the State College Borough Water Authority with deed restrictions for water protection in 2008.

The new Lots 6 and 7 included about 100 acres, zoned Rural Agricultural. These two lots were sold by Penn State to joint current owners Centre Region Council of Governments and Ferguson Township, in 2008 and 2011, for the Whitehall Road Regional Park development.

The crucial link between luxury student housing and the regional park is a series of notes in the 2007 subdivision plan requiring the developer of Lots 3 and 4 (the Penn State/Toll Brothers site) to install traffic improvements, an access road with utilities, and a sewage pump station to serve both the future multi-family development and the future park.

Notes 9, 10 and 11 required the developer of lots 3 and/or 4 “to submit a traffic study and traffic signalization plan for the Blue Course Drive-Whitehall Road intersection...which includes the design of Whitehall Road turning lanes to accommodate lots 3 and 4 if deemed necessary...and installation of traffic signalization if not previously installed...to design and install a sewage pump station to provide public sewer services for lots 3 and 4, and provide access to the pump station to lots 6 and 7 for park use only...and to install a cartway, sidewalks and street trees to township street standards, and public water main extension to the southern terminus of the 90’ Blue Course Drive right of way extension between lots 3 and 4.”

These three notes link the Toll Brothers/Penn State student housing project and the Centre Region Parks & Recreation Authority active sports park project.

And they are the source of a severe conflict of interest for public officials working through the Centre Region Council of Governments (COG), because they ensure that COG entities have a direct financial stake in the successful completion of the private luxury student housing – regardless of the well-documented public health and safety risks – to ensure private funding for traffic improvements, road access and water and sewer service connections for the proposed park.

This is why those who oppose the Toll Brothers project also oppose the sports park.

Right now, the rest of the land around the Penn State- and COG-owned parcels is zoned Rural Agricultural, and for intensive development to occur, the zoning would have to be changed by the Ferguson Township Board of Supervisors.

Tragically, there’s precedent for that: the 2004 rezoning from RA to R4 that made the Toll brothers project possible to begin with. And there’s precedent for developers to use an existing development as a reason to allow adjacent rezoning. Bottom line: to protect the drinking water recharge area, productive farmland, Slab Cabin Run and the Regional Growth Boundary, our community must stop the student housing development, the Whitehall Road Regional Park project, and any other developments proposed for that farmland and the Harter-Thomas watershed.

### *Toll Brothers Housing Project Background & Spring Re-cap*

In 2015 – after enduring the 2011 Sandusky scandal and the 2013 Columbia Gas/Penn State pipeline fight, Centre Region residents were forced to mobilize for our own public safety against another Penn State threat, when we learned that Penn State had engaged in a sweetheart land deal with Toll Brothers developers to build 1,093-beds of luxury student housing units right on top of the groundwater recharge area for our public drinking water supplies.

We have no large lakes, reservoirs or rivers in the Centre Region. If our groundwater is contaminated, we're screwed.

And Toll Brothers has a horrible record of non-compliance with Clean Water Act regulations.

The planned residential development was tentatively approved by the Ferguson Township supervisors on March 2, 2015 and received final supervisor approval on Nov. 16, 2015, in a sequence of illegal maneuvers intended to help Penn State and Toll Brothers avoid proper municipal rezoning, subdivision, lot consolidation and zoning variance procedures.

Those maneuvers formed the basis for the Nittany Valley Water Coalition land use appeal filed in December 2015. Disclosure: I am a plaintiff on the land use appeal.

In July 2016, Centre County Court of Common Pleas Judge Jonathan Grine ruled in favor of the plaintiffs, finding that Toll Brothers, in collusion with the Ferguson supervisors, attempted to “end run” or unlawfully circumvent local zoning ordinances. Toll Brothers appealed to Commonwealth Court in August 2016.

The county court decision was reversed on May 17, 2017 on a procedural technicality. But the Commonwealth Court panel did not address the substantive underlying issue of whether municipal supervisors can rezone land through subdivision and lot consolidation without following the prescribed Pennsylvania Municipalities Planning Code zoning rules, the Centre Region Council of Governments Regional Growth Boundary/Sewer Service Area Implementation Agreement rules and Ferguson Township zoning ordinances.

### *Whitehall Road Regional Park Background and Spring Re-cap*

In the meantime, the Toll Brothers litigation forced COG elected and appointed officials to wrestle with two main problems derived from the tight link between the private student housing and the public park.

What should they do about the mismatch between available funding and construction costs, exacerbated by the loss of private developer funding for traffic improvements, water and sewer service, and paved access road construction?

What should they do about the June 1, 2017 final drawdown date for the Fulton Bank loan money originally

borrowed on June 1, 2011 and renegotiated several times in the intervening six years?

COG efforts to answer these questions began with a July 7, 2016 feasibility study conducted by Stahl Sheaffer engineers and then circulated to elected officials for review.

On July 20, 2016, Patton Township supervisor George Downsborough stated: “The existing plan is broken” and advocated that the General Forum direct the Parks Authority to square the books, retire the loan and conduct a regional assessment of needs and resources to inform development of a new plan.

However, the July 25, 2016 General Forum meeting was the last time the General Forum members were permitted to discuss the many complex issues involved in the decision as a regional coordinating body, because the topic was restricted to “information-only” items on the September, October, November, January, February, March and April General Forum agendas. (The August and December General Forum meetings were cancelled.)

Also in July 2016, Maher-Duessel government auditors submitted a FY2015 audit package regarding the Centre Region Parks & Recreation Authority accounting.

The audit included a “Basis for Adverse Opinion on U.S. Generally Accepted Accounting Principles” section, which noted:

“To meet the financial reporting requirements of the Commonwealth of Pennsylvania, the Schedules are prepared by the Authority on the basis of the instructions provided by [the Pennsylvania Department of Community and Economic Development], which is a basis of accounting other than accounting principles generally accepted in the United States of America. These requirements permit the Schedules to be prepared without financial statement disclosures, without cash flows, and without Management’s Discussion and Analysis. The effects on the Schedules of the variances between the regulatory basis of accounting described above and accounting principles generally accepted in the United States of America, although not reasonably determinable, are presumed to be material.”

From investopedia: “...Adverse opinions are not a good thing for companies because it implies wrongdoing. An adverse opinion is a red flag for investors,” in this case, Centre Region taxpayers.

The auditors’ findings have been completely ignored by COG General Forum and Finance Committee members, at least in public settings, and did nothing to deter a majority of General Forum members from tacitly endorsing (on May 22, details below) continued Parks Authority board access to a \$4.8 million Fulton Bank line of credit to build a regional action sports park on the watershed, to be paid back with \$1.4 million in interest by regional taxpayers.

To break the public debt burden down further, in October 2016, I asked COG Finance Director Joe Viglione for data about the budget impacts of Downsborough’s July 20 proposal, which would have left taxpayers on the hook only for paying off the principal and interest for the funds

spent up to this point on Oak Hall Regional Park Phase 1 and Hess Field.

Viglione provided documents showing that the principal and interest on the completed Oak Hall and Hess projects would be paid off by roughly December 2019. The financial reports further showed that, if the Whitehall Road project abandoned, for the 12 budget years between January 2020 and December 2031, the five participating municipalities would save about \$6.2 million in principal (\$4.8 million) plus interest (\$1.4 million). That equals about \$520,000 per year for the region. The \$6.2 million total would be saved by the municipalities roughly as follows: \$1.75 million by Ferguson Township, \$1.46 million by State College, \$1.32 million by Patton Township; \$1.13 million by College Township, and \$590,000 by Harris Township.

For further financial context, there has been no public discussion to identify sources for annual WRRP operating costs of about \$234,000 per year after construction, nor for Phase 2, 3 and 4 construction, nor – if plans for artificial turf fields move forward – for \$2.2 million in turf replacement costs required every 7 to 10 years.

Moving along.

In December 2016, the General Forum took action to appoint an ad hoc WRRP reworking committee, to address the Phase 1 funding shortfall driven by the delay in the adjacent student housing development, and to address the looming deadline for the drawdown of the Fulton Bank line of credit.

At a January 2017 ad hoc committee meeting, then Parks Authority chair Sue Mascolo publicly whined about the fact that voters in COG municipalities had elected new representatives on their legislative councils and boards in the last couple of years, representing different community priorities for taxing and spending decisions, and replacing many of the representatives who had approved elements of the WRRP plans over the last decade. Some of the new representatives don't support the long-term, multi-million dollar, multi-phasic plans that the old representatives supported.

In Mascolo's staggeringly entitled view – expressed at the meeting – this is a flaw in the new supervisors and the voters who elected them, rather than a healthy sign of changing voter priorities under changing social, political and economic conditions, and responsible use of the electoral system to address those changing conditions.

Her concerns were simply for show, however, because she and then-Parks Capital Committee chairman Tom Daubert, along with COG Executive Director Jim Steff, CRPR Director Pam Salokangas and Ferguson Township Board of Supervisors Chair Steve Miller, continued to carefully, quietly restrict the range of motion available to local legislators, through continued use of information-only agenda items at General Forum meetings, coupled with dissent-suppression at committee-level and municipal-level meetings.

These tactics were used in direct contradiction to Steff's oft-stated views about the consensus-building,

conflict-resolution purpose of the COG in general, and General Forum in particular.

*April 2017*

While officials, plaintiffs and the general public waited for the Commonwealth Court decision, the ad hoc WRRP planning committee held its third and final meeting in April. Observers heard side-comments and saw changed body language by Salokangas and others suggesting that someone had pulled strings to get a park-favorable decision from the three-judge Commonwealth Court panel.

In any case, to observers, park proponents seemed otherwise inexplicably more relaxed about the budget issues, more confident that the cost pressures and the loan renegotiation process were well under control.

As it turned out, their confidence was well placed.

Without General Forum review or authorization vote, the “advisory” COG Finance Committee on April 13 retained Chris Gibbons of Concord Public Finances for \$5,000 to begin private negotiations with Fulton Bank representatives about extending the loan drawdown date again.

CRPR Director Pam Salokangas appeared at the April 24 General Forum meeting to give yet another information-only presentation to legislators on Whitehall Road Regional Park.

Salokangas described the revised design plan selected earlier in April by the ad hoc WRRP working group. Under the amended “Option 1A” design, the Parks Authority, acting as a land developer using public funds, would build on 38 acres of the original 75-acre Phase 1 site.

Contractors would grade the area and install three playing fields, one practice field, 250-275 parking spaces and a playground, plus a walking trail. Off-site work would include gravel access road construction, installation of water and electrical lines, and upgrades to three nearby traffic intersections. With no public funding for installation of a sewage pump station to serve flush toilets, portable toilets would be brought onto the site for public use after the park opened.

If the fields were to be grass, the total budget for the scaled back “1A” project was presented as about \$800,000 over the available \$4.8 million in loan-based public funding from COG taxpayers. If two of the fields were to be artificial turf with electric lights, that would add about another \$2.7 million, making the total projected overrun about \$3.5 million and the total Phase 1A project cost about \$8.3 million.

Salokangas also presented a pay-to-play kicker. To make up the funding shortfall without asking COG taxpayers for more (because some electeds have made clear that they're tapped out), Salokangas said she'd been making the rounds to private entities – mostly soccer, lacrosse and other rectangular sports clubs, and the Central PA Convention and Visitor's Bureau – asking for “donations.”

But her contacts with those private “donors,” including what she’d offered them in terms of access and what they’d offered her in cash, were described as “proprietary” information that she was not at liberty to share with local elected officials or the general public.

In response to a question from Ferguson Township Supervisor Peter Buckland, Salokangas admitted that the tentative verbal agreements gave the private “donors” about 30-40% use of the playing fields, leaving 60-70% for Centre Region Parks & Recreation programs and general public use. Further, general public groups interested in using the fields would likely have to pay a rental fee.

### *May 2017*

On May 11, there was a joint meeting of the COG Finance Committee, the COG Parks Capital Committee, and the Centre Region Parks & Recreation Authority board, along with CRPR Director Salokangas, COG Executive Director Steff, COG Finance Director Viglione and Concord Public Finance consultant Gibbons.

It was 16 years into the park project triggered by a 2001 request from some soccer clubs, and still, no one at the meeting could express a clear understanding of which governmental entity had the authority to fund or not fund the project when the current loan and guarantee agreements expired as of June 1, 2017.

Instead, just about every official who spoke at the meeting used the phrases “we can decide,” and “our decision,” without specifying which “we” they were referring to. They were relying on analysis by conflicted solicitor Terry Williams, who simultaneously represented a good chunk of the loan collateral (taxes encumbered through the elected State College Borough Council), the borrowers/developers (appointed Parks Authority) and the pass-through agency (COG).

George Downsborough, Patton Township Supervisor, made some comments reiterating Patton Township's general support for the project, but urging the party empowered to close the loan – whoever that might be – to close the loan, work through the myriad remaining hurdles, and then take out a new loan if and when the project's scope and path forward become clear.

Downbrough was told that General Forum wouldn't have any more opportunities to legally re-pledge taxpayer funds for an extended loan. General Forum would only have an opportunity ritualistically “ask” the Parks Authority to re-pledge taxpayer funds for an extended loan.

There was no discussion of what would happen if the ritual “ask” failed to get a majority of either individual or unit votes at the May 22 General Forum meeting; or if there were no motion made or seconded to entertain the “ask”; or if there were no quorum of legislators present at the May General Forum, leaving the Parks Authority without the fig leaf of legitimacy to sign loan documents purporting to have the legal authority to encumber taxpayer funds after that June 1 deadline.

After the non-discussion May 11, State College Borough Council Chair Tom Daubert of the COG Parks

Capital Committee made a motion that Parks Capital endorse the General Forum ask to the Parks Authority to extend the Fulton Bank loan for another three years: June 1, 2017 to June 1, 2020. College Township Councilwoman Carla Stilson seconded the motion. Daubert added some language proposing the various boards and committees who may or may not have the authority to close or extend the loan further, discuss it again by June 1, 2018, if no construction contracts have been signed by then.

For COG Finance Committee, College Township Councilman Rich Francke made a similar motion, and Harris Township Supervisor Bud Graham seconded it.

Ferguson Township Supervisor Laura Dininni – speaking as a citizen only – made extensive comments about the enormous procedural open governance due process violations that have occurred: most crucially the repeated refusal of agenda-setters at General Forum (Eric Bernier in 2016 and Tom Daubert in 2017) and Ferguson Township (Steve Miller) to allow frank and open discussion among legislators of the myriad complex governance and financial issues in play, from last July until the present.

The two committees then voted.

The Finance Committee vote was 3-2, with Graham, Miller and Francke voting “Yes,” and Evan Myers (State College) and George Downsborough (Patton Township) voting “No.” The Parks Capital Committee vote was 3-2, with Daubert, Stilson and Janet Whitaker (Ferguson Township) voting “Yes,” and Bruce Lord (Harris Township) and Downsborough - standing in for Dan Trevino (Patton Township) voting “No.”

COG staff then announced that they had already retained bond counsel Jens Damgaard to prepare the loan extension documents ahead of the May 22 General Forum meeting, *before* the Finance and Parks Capital committees had even voted on whether to recommend General Forum “ask” the Parks Authority to proceed.

The May 16 COG Executive Committee meeting was cancelled and rescheduled for May 17, at the College Township municipal building rather than the usual COG building.

At the Executive Committee meeting, Salokangas announced the Commonwealth Court ruling and handed out copies of the decision, which rewarded the confidence of those who had appeared visibly relaxed by mid-April. The Commonwealth Court panel found in favor of the developers, and against the homeowners and farmers, focusing on the 30-day window of time for appeal after the March 2, 2015 “tentative planned residential development” approval by the Ferguson Township Board of Supervisors.

If allowed to stand, the Commonwealth Court decision sets a very interesting precedent: that a municipal legislature may repeal or amend any portion of municipal zoning laws not only by the two traditional methods: legislative amendment or by waiver procedures before the Zoning Hearing Board, as set forth in the PA Municipalities Planning Code, but also through the approval of a “tentative” land development plan that includes the zoning amendment, so long as the local legislature isn't caught doing so and formally challenged by

alert citizens within 30 days of the "tentative" act. If they make it 30 days without being caught, the zoning law change stands.

The remainder of the Executive Committee discussion on WRRP on May 17 was an awkward shuffle toward endorsing a version of the "ask" recommended by the Finance and Parks Capital committees by 3-2 split votes at their joint May 11 meeting, for inclusion on the May 22 General Forum agenda. At one point, Patton Township Supervisor Elliot Abrams referred to the Daubert stipulation regarding review as a non-binding "red herring" intended to gain legislator support for an otherwise unpopular General Forum move, particularly if split off from the main resolution as recommended by bond counsel Damgaard, conveyed via Steff. The Executive Committee endorsed the two-part agenda item.

Meanwhile, the May 18 Parks Authority meeting was cancelled and rescheduled as a special meeting for May 24, to ensure that it would take place *after* the General Forum meeting but *before* the June 1 refinance deadline.

On May 22, the General Forum voted as expected, on a resolution "asking" the Centre Region Parks & Recreation Authority revise the loan from Fulton Bank, originally obtained in June 2011, and then spend it for the proposed-but-unbuilt Whitehall Road Regional Park that 74% of 1,037 respondents to a November 2008 Centre Region Parks and Recreation survey said they didn't want.

Under conflicted-solicitor Terry Williams' legal analysis, gently endorsed for General Forum members by bond counsel Damgaard and finance consultant Gibbons, the last time General Forum had a legally binding role to play in the project was in April 2011, when the representatives serving at that time adopted the original municipal guarantees.

According to that theory, the original guarantees had no expiration date, and all of the intervening General Forum "votes" held Nov. 28, 2011, Dec. 18, 2012, May 27, 2014, and Nov. 23, 2015, were equally legally meaningless.

And, according to that theory, the only binding decisions since April 2011 had been made at Parks Authority meetings by appointed representatives, and the next binding decision would be made at the special May 24 meeting of the Parks Authority board.

General Forum attendance was spotty: Evan Myers and Jesse Barlow were absent from the State College delegation, and Abrams was absent from the Patton Township delegation.

Once again, by Daubert diktat, General Forum members were explicitly forbidden to discuss any park-related issues outside the narrowly-written motion "asking" the Parks Authority to move ahead, thus putting the lie to the litany of public promises made since August 2016 that there would be eventual broad, deep legislator deliberation before the project could move forward.

The vote on the measure was roughly 18 - 4, with Halfmoon Township abstaining. The four "No" votes were cast by Laura Dininni and Peter Buckland of Ferguson Township) and David Brown and Janet Engeman of State College.

The 18 "yes" votes were cast by representatives apparently believe \$6.2 million is a good price for Centre Region taxpayers to spend on a gravel road and about 65% access to three soccer fields and some Port-o-Potties.

That, or it just didn't matter to them one way or the other, since they knew their votes were meaningless.

Oddly, there was a palpable frisson of relief in the air around Daubert and Steff when they finished counting the votes and confirmed that despite four "No" votes, all five voting units had managed to provide quorums and obtain majority "Yes" votes: 3-2 for both Ferguson Township and State College.

In due course on May 24, the Parks Authority board met. State College representative Jim Dunn was absent. Steff handed out a series of purportedly legal documents, and announced that earlier in the day, Daubert had signed a copy of a version of a document memorializing the May 22 General Forum "vote."

Laura Dininni and I both expressed skepticism at the legality of the proceedings, but the Parks Authority board members appeared to be comforted by Steff's reassurances that bond counsel Jens Damgaard had prepared the documents and therefore implicitly believed the deal to be legitimate.

A few moments later, the Parks Authority board members in attendance voted 5-0 to approve/ratify/adopt the documents, and authorize Chair Chris Hurley and Secretary Kathy Matason to sign them.

The revised loan documents left intact Section 3.04 from the original 2011 loan contract, which states:

"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."

"At any time," could theoretically be as soon as the June 2017 General Forum meeting.

On May 26, Nittany Valley Water Coalition plaintiffs decided to appeal the Commonwealth Court decision to the Pennsylvania Supreme Court, petition corporate Penn State to break the sales contract with Toll Brothers, and launch an occupation of the development site.

The occupation began Saturday, June 3.

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