

# SPECIAL WEST AMWELL TOWNSHIP COMMITTEE MEETING

## July 21, 2011

The West Amwell Township Committee met on the above date at 7:05 p.m. Present: Mayor Molnar, Committeemen Fisher and Rich, Attorney Faherty. Also present were Arthur Foran, Gordon and Natalie Whiting, Henry Nelson, Attorneys William Tauriello & William Friedman, Cathy Urbanski, Hal Shute, Dave Beaumont, and John DuPuis

In compliance with the Public Meetings Act, Mayor Molnar announced that this Special Meeting was called pursuant to the provisions of the Open Public Meetings Act with notices faxed to the Hunterdon County Democrat and the Trenton Times on July 18, 2011. A copy of this notice is and has been available to the public and is on file in the office of the Municipal Clerk.

Cathy Urbanski led those in attendance in the pledge to the nation's flag.

The meeting was recorded via digital recording system.

**AMWELL DAM 1 REPAIR APPLICATION:** William Tauriello, a Flemington attorney representing three of the four property owners involved in this project—Arthur Foran, Gordon and Natalie Whiting and Henry Nelson—addressed the Committee. As background, he stated that there is loan money being sought from the State of New Jersey by the group and that the fourth property owner, Amwell Valley Conservancy, has decided not to participate in the loan but to fund their portion directly. They will, however, be part of the construction process and retain a 25% share of the cost and obligation. The Amwell dam is located on the property of Mr. Nelson situated on Queen Road/County 605, the north side of which is near the Rt 202 overpass. The property owners have been determined by the court to have responsibility for dam repair. One favorable item since this matter was first brought to the Committee in 2008, is that the project cost has gone way down. At that time it was projected that construction costs would be around \$640,000; but, through the efforts of his clients, these costs have been reduced to an estimated \$365,000. As the gun club is paying its share directly, the loan request is \$275,000, which also means that there is less financial responsibility to the town. A lot of hard work has been done by the group to find favorable bids in order to bring this project in as economically possible. Mr. Tauriello stressed that time is of the essence; that everything possible is being done to get construction started in the next month or so; and, expressed appreciation to the Committee for their cooperation in entertaining them this evening.

Arthur Foran came forward stating that his property is located at 60 Frontage Road and that he is one of the land owners around the lake. A handout was provided and a review of the time line of events for the property since Hurricane Floyd on September 17, 1999 was given. He relayed that the group has been working diligently with DEP and their engineer, Medina Consultants, to get the plans approved and receive a dam safety permit required for the project. This has taken many years. Final plans from DEP were received in May/early June. Contact was then made with Fletcher Cramer, a well known contractor in the State of New Jersey, for estimates on both construction cost and length of time required for the work. A detailed construction schedule indicated the latter to be 4-6 weeks. The significance is that there probably will be one or two payments from DEP regarding the loan and the project must be done before winter due to the fact that most of the work is concrete. In line with the DEP permit received, the project has to be started within six months, bringing the time frame to the end of November. Therefore, the latest possible start for the contract is the middle of September. Mr. Foran also relayed that the dam was built in 1928; has a core concrete wall with an earthen overburden; and, that Hurricane Floyd dumped so much water on the middle and lower lakes, that the water level rose causing a blow out of the earth on the top of the core wall. Once the rain stopped, it looked pretty scary with such a big hole in it. At the time it was thought to be just an earthen dam but was later discovered to have a concrete core. There was both federal and State involvement and consequently studies were done to determine the classification of the dam, soundings of the lake were taken, a lake survey was completed as well as a study to find out the cost of decommissioning. It soon became clear that it would be most cost effective to repair the dam. As part of the discussions with DEP, agreement was reached to have the design of the repairs/rehabilitation meet the 100 year storm level. To accomplish this, a secondary spillway in the center of the dam, elevated to the top of the core wall with a large sidewalk on the back side of the dam will be constructed. The \$365,000 cost is broken down as follows: Fletcher Cramer - \$305,310; construction administrator - \$25,000; and, due to the project size and complexity, a 10% contingency. The most significant reduction from the original proposed cost comes from the economy being in the tank and motivated builders. Mr. Foran continued that they also employed a professional cost estimator and the group is confident that the number provided by Fletcher Cramer is reasonable from both a professional point of view and the market place. They tried to do their homework with respect to making this

a reasonable project at a reasonable price and want to get it done. The six month clock is running and if things derail, there would be a problem with DEP due to wetlands at the base of the dam which would preclude the start of construction until August 1<sup>st</sup> of next year. Increased costs would also be incurred by waiting. Mr. Foran directed the Committee to the third page of the handout showing how the project would be structured between all parties; noted that three of the four landowners have formed an LLC; that Attorney Tauriello is working on the operating agreement with a draft expected shortly; and, that the group has a certificate of formation. The 4<sup>th</sup> land owner will be providing their share in cash. A court consent order determined percentage shares for the property owners involved (Whitings - 20%; Foran - 25%; gun club - 25%; Nelson - 30%) which will run throughout the project. Mr. Foran re-iterated that the group is motivated and all the permits are in place. The road permit for Frontage Road has been changed to Queen Road and the County has indicated that there will be no problem with acquiring a road construction exit permit. Therefore, once the group gives the contractor the notice to proceed, building permits will be filed with the township and the County. Also noted was that the freshwater permit is in place; the soil erosion control application for permit has been extended; all permits are in motion and in order; that the group has obtained a good construction price, a good contractor, a good engineering price from Median, and the construction administrator is a civil engineer familiar with dams. The latter will be on-site during construction, will take pictures every day as well as handle the required DEP reports. Once everything is in order, DEP will be called, given the inspection plan, and concrete cylinders will be pulled for lab testing. Mr. Foran stated that they are ready to move on this. The schedule is extremely important as they have only six to seven weeks to get the loan agreement squared away and Committee paperwork in order to take advantage of this six month window.

Attorney Tauriello explained that the Dam Safety Act has been in place for a number of years and that there's also quite a bit of litigation in the courts about how it works and who gets assessed. In the statutory law, it says that even with a private dam, a town must be a co-borrower. There is also case law that interprets the statute; states that when a private applicant comes forward, the town must engage in a good faith study of the situation; and, that the town must show an openness to fulfill its responsibility by being a co-borrower. Also noted was that if the owners couldn't organize properly, DEP would de-commission the dam. The latter would mean they would turn to the property owners; there would be turmoil environmentally because the dam would be removed; wildlife would have to be removed; private property would have to be re-graded; and DEP would still be looking to assess somebody. The group has been advised that the cost of de-commissioning the dam would be five times the cost of fixing it.

An extended discussion and question period ensued over this law; the subsequent municipal responsibility to act as co-borrower on the DEP loan; the cost burden; the special assessment provision available for the town should they have to take responsibility which gives the Township a top priority lien on the properties involved; concern that the taxpayers of West Amwell could, theoretically, end up footing the bill should there be a default with any one of the property owners; and, the issue of public vs private financing for the project. It was stated by the attorney that once DEP approves the loan, and the applicants sign and the town co-signs, there are requirements for performance bonds to be posted and other common construction insurance as part of the loan agreement with each contractor signing a certification that he's duly insured.

Although the Committee members indicated that they wanted to help and acknowledged that the chance of the Township getting drawn into a problem situation is remote, it wouldn't be in the law unless there was that possibility. Therefore, if the Township is on the hook for something, time is needed for their review and that the law's requirements need to be provided to Attorney Faherty as the current Committee was not here in 2008 when the application was approved.

Attorney Tauriello agreed to supply the background legislation, the regulations concerning the assessment process and the town's role as co-borrower to Attorney Faherty by Friday. He then turned to the matter of the LLC that has just been formed and which will become the new agent for taking the loan. The State has been informally advised of this action and a specimen loan document has been provided to Attorney Faherty. In that document is a pro forma resolution required by the State. The technical adjustments needed due to the new LLC will be taken to the State and will include the lower loan amount. He also explained that the way the agreement is structured, the Township is more of a guarantor because there is no expectation that the Township build the dam, pay the contractors or make the semi-annual loan payments.

According to the document, the primary borrower, which would be the LLC, does all the construction administration and pays the loan. If the loan is not paid on time, the State would come to the Township about the default and call on the Township's responsibility. However, that is not expected to happen. The process of payment on the loan by the LLC and its members, according to the contribution percentages, was also explained.

One of DEP's requirements for the LLC, according to Mr. Foran, is that they have a financial officer in charge of the loan. This is the person to whom each of the parties would send their checks. An operating account would be set up and just one check would go to the State. . The LLC has been in business since last Friday and the operating statement/agreement is now being developed for distribution. The group has someone who would be willing to serve as the financial officer for the LLC. The ideal situation is for this to be a professional office to handle the books for the loan repayment. He assured the Committee that all would be accountable, transparent and audited and that the group will work out whatever is needed so the town is comfortable.

A question concerning liability upon default was raised. As a co-borrower, the Township would be fully responsible. However to be fully so, all members would have to default. The Township would have the first lien on the properties involved per Attorney Friedman, who is both Mr. Foran's personal attorney and an attorney assisting with the process. He explained that the regulations specify that the Township would hold first place on a property superseding any other mortgage. The law says that the municipality is required to be a co-borrower and although the municipality can impose requirements on the other private parties here, e.g., special assessment, the Township is required to make a good faith effort to be a co-borrower to stand behind that loan. This is all that is being asked for and the Township's protection would be the special assessment which means whenever the property gets sold, the Township gets made whole. Asked about whether the State has agreed to deal with the LLC, Mr. Tauriello stated that this is preferred and that the attorney general has indicated a preference for a formal entity such as an LLC.

Mr. Foran relayed that the original loan was applied for under the Lower Lake Steering Group and was approved. The group is still the Lower Lake Steering Group LLC although at the time it was not realized that there would be one less member than originally anticipated.

Discussion continued about devices to protect the taxpayer and what was done in the past, such as hold harmless and indemnity agreements and mortgages to insure the Township against liability. Some of this was deemed duplication and that the Township would be better off having the special assessment due to its statutory priority. Attorney Faherty will look into the latter but noted that the resolution requested of the municipality by the State states that: "The Township of West Amwell council authorizes and hereby agrees to complete the dam restoration project and reimburse the State in accordance with the terms and conditions of the loan agreement in the event of a default on the part of the Lower Lake Steering Group." Mr. Friedman emphasized that the project is going to be completed in 6 weeks; that this is the standard form that the State sends out; the project will be completed; and there is no talk about a Township obligation to complete it. There was, however, an expectation on the part of the group when the application was signed and resolution approved in 2008 that the Township would be the co-borrower. Mr. Tauriello added that at the time the application was either not filed or just pending as the plans weren't completed. Although there is conditional language in the resolution, he believes that this was because the plans weren't finalized. The latter has now been done and the cost reduced by over half, so the group has come back in the spirit of where things were in 2008 and that there's also recognition of a public benefit to the project. The town has to act as a co-borrower because the State won't permit the process to go forward without it. All that is being requested is terms that are fair and, although the Committee's thoughts about the situation are understood, there are great reasons to have this project go forward now because the cost will go up significantly if not done within this half year window.

Mr. Friedman read a portion of a court decision on a similar case in Sussex County. A citation of NJSA 58:4-12d was referenced regarding loans awarded under this section to owners of private dams and lake associations whereby local government units are required to act as co-borrowers, that cooperation has to be reasonable, and cannot be unreasonably withheld. A State loan is not possible without this and under the State program which the Township agreed to apply for in 2008, the Township is obligated as the co-borrower. Once the application was signed in 2008, the Township sent the message that a stamp of approval was given to the group to go to the State. Mr. Tauriello added that the Township Committee has to decide what is fair and how to structure the agreement. The court case says that the Township doesn't have a

chance to say yes or no or send it elsewhere. Now that the LLC has decided to go this route, it is up to the town to decide what's fair to the town in terms of the protection sought and what other terms might apply. Mr. Faherty will be provided with the legal materials for review so that the Committee can be advised accordingly. It was noted by Attorney Faherty that a lot has changed in the Township since 2008 when the decision was made and at the time, the Committee was relying on the fact that State was giving them a substantial amount of money every year. This is longer the case.

A special meeting will be scheduled for July 27<sup>th</sup> at 5 p.m. with the understanding that Attorney Faherty will receive the promised materials in ample time for review prior to that time. With expressions of appreciation for the Committee's attention, the group left the meeting.

An extended discussion of the situation at hand, and possible ways to protect the taxpayers, ensued between committee members and Attorney Faherty. John Dupuis offered that Hopewell Township had a similar problem and may have some pertinent information.

Cathy Urbanski questioned the 20 year loan and what would happen if someone would die. She was concerned that this is a rather large sum of money and that although the responsibility would be on the LLC, there would be no personal guarantees.

**MUNICIPAL WEBSITE:** A comparison of the two website proposals requested at the last meeting were presented for comment. A question from Mr. Beaumont as to the direction of the proposal was addressed in that the Committee is looking for a new website that is more user friendly; one that is able to be updated in-house; and, has easy assess to information from the home page. The recommendation of Mr. Shute was that Mr. Gill's free offer is hard to turn down, especially as he will handle the webmaster portion until the in-house staff has been trained. Mrs. Urbanski explained that Mr. Gill's own website is good; is easy on the eyes; and, that he has templates for a functional site. The person who provided the other proposal has no municipal experience; has higher cost for both templates and training; does not provide hands-on guidance; and, webmaster services would also be extra. Mr. Beaumont suggested that a team be assembled to determine how the website should be revamped and what the look/feel should be. He also was of the opinion that the group should encompass a representative group from the community to help with the design and that there is much on the website that is dated. John Dupuis commented that a website is old if it's been in place for two years. There needs to be process for quick uploads and the ability to upload information from off-site. He noted that even though this is a paid position at the school, many have trained and subsequently moved on. The decision of the Committee was to go with Mr. Gill. The website team will consist of Dave Beaumont, Cathy Urbanski, Hal Shute, and Lora Olsen. Next steps include getting on Mr. Gill's website development schedule and convening the website team to begin discussing the display of information.

**OPEN TO THE PUBLIC:**

Mr. Beaumont inquired about the criteria to be used in the upcoming re-assessment. The mayor relayed that he's been receiving numerous phone calls expressing similar concerns. Work done without permits will be one item flagged. He also inquired as to whether the Committee was still interested in monthly updates concerning the high school and relayed that a vote was scheduled for this evening to select and approve a vendor for the regional feasibility study. Also noted was that the high school received over \$130,000 in additional State aid with the elementary school receiving around \$80,000.

**ADJOURNMENT:**

There being no further business, the meeting was unanimously adjourned at 8:51 p.m. on motion by Molnar, seconded by Fisher.

Respectfully submitted,

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Lora L. Olsen, RMC  
Township Clerk