

**BOONSBORO KEEDYSVILLE WATER ADVISORY BOARD
MEETING MINUTES
Wednesday February 28, 2024**

Voting members present -Jean Holloway, Chairperson; Tony Nally (B), Howard Long(B), Matt Hull (K), Brandon Sweeney (K)

Others present - Water & Sewer Superintendent Pete Shumaker, Eric Kitchen (B-Alt), Sarah Baker (K-Alt), Keedysville Town Administrator Lisa Riner, Boonsboro Town Manager Jared Schumacher, Boonsboro Town Planner Drew Bowen and Yvette May, Recording Secretary. The meeting convened at 6:30 PM at Boonsboro Town Hall.

- I. **Approval of the December 18, 2023 Meeting Minutes.** – Motion by Board Member Hull and second by Board Member Long to approve Minutes. **Motion carried unanimously.**
- II. **FY24 Keedysville cost-sharing projection** – Chairperson Holloway stated this will be on hold until the financial statements for Boonsboro are completed. The True-up will be reviewed at the next meeting.
- III. **Review of Boonsboro capital projects**
 - A. Park Well Replacement – W/S Superintendent Pete Shumaker informed the Board that the well is almost online. Received test results from Frederick Lab but MDE now needs additional test to be completed.
 - B. Boonsboro Reservoir Replacement – Whitman Requardt & Associates (WRA) has completed the final design at 100%. Town Planner Bowen stated Plans are being submitted to MDE and March 8th is the deadline for review. He stated that permits are being worked on and he is reaching out to Washington Co Roads. He is notifying residents that will be impacted. Hopefully the project starts in Spring 2024. Cost estimate is between 9.6 million and 11.9 million.
- IV. **Review quarterly usage report and metering between the Towns (Austin)** – Chairperson Holloway reviewed FY23-FY24 usage and compared it to the previous quarters. She stated losses were higher in Boonsboro over the past few quarters. The quarterly gallons lost for Boonsboro went from 25 % in the first quarter to 38% in July 2023 and has stayed at 38.7% loss. Gallons billed to customers have stayed constant. Town Manager Lisa Riner stated that Keedysville usage was higher due to the Water Tower maintenance.

V. Old business

- A. Water resources/asset management study by Army Corps of Engineers –Town Manager Schumacher informed the Board that there were no new updates, and that Engineers were still working on reports. Jean Holloway suggested contacting Michael Harshman with SERCAP to complete the reports. Motion by Board Member Howard Long second by Board Member Brandon Sweeney to change percentage of the Reserve back to 10%. **Motion carried unanimously.**
- B. Draft new consolidated agreement between the Towns
 - 1. King Road Agreement – Town Planner Bowen stated he has had contact with a King Road representative and there is discussion of future development. – BMUC Liaison Nally informed the Board that there was a meeting with the Town Attorney about King Road's annexation agreement, and the Town has been advised the developer is in default.
 - 2. Review available capacity allocation – Chairperson Holloway states that the 554 planned King Rd. EDUs needs to be deleted from the calculations since the developer is in default. The Board was also in agreement to change the percentage of the reserve back to 10% to meet MDE standards. Board Members agree to present agreement with those changes to each town's Council.

VI. New business

- A. Review of proposed CIP projects for coming year
 - 1. Crestview High Pressure Bypass Project – WRA has completed plans, and a cost estimate of the installation of a parallel line around Crestview and pressure reducing valves lowering the pressures entering the neighborhood.
 - 2. North End Sewer Connections- Boonsboro is working with WRA for different options and cost estimates to provide sewer connections to the north end residents zoned general commercial.
 - 3. Dean South Water looping- Town Planner Bowen reviewed the improvement plan with public works and is concerned with the water line from Chase Six. He suggests looping through Knode Circle. He is working with WRA for engineering and cost estimate.
 - 4. Bedrock Waterline Replacement - Town Manager Lisa Riner stated the town will be replacing Bedrock Lane/Circle and Coffman Farms Road water lines in Keedysville.
 - 5. Security for water sources - Town Manager Schumacher informs the Board that the town will be getting cost for Installation of security cameras on all water and sewer facilities.

- B. Review of Water Rates for each town. – Jean Holloway reviewed the rates with the Board.

VII. System operator's report - Utilities Superintendent Pete Shumaker stated there is a bad transducer at the tower and is a 6 week wait for replacement at a cost estimated to be around \$700.00. Town Planner Bowen asked when the last time the water appropriation permitted daily average flow was calculated. Board Member Matt Hull stated that the MDE decreased it after taking away a good amount of Recharge acreage and that limited the amount of water the towns can pull.

VIII. Public Comment - None

There were no additional discussions, Chairperson Holloway adjourned the meeting at 7:21 pm. The next regularly scheduled meeting is Wednesday May 8, 2024, at 6:30 PM at Keedysville Town Hall.

Submitted by Yvette May Administrative Assistant Town of Boonsboro

Boonsboro/Keedysville Regional Water System
FY23/24 Quarterly Usage Report

Month	Fin - Utility	Production	Raw Water Metered		Total	Monthly Usage Received Per Town				Qtrly Gallons Billed to Customers			
	Keedysville	Well #8	Warrenfeltz	& Park Well		Boonsboro	%	Keedysville	%	Boonsboro	Lost	Keedysville	Lost
Jul 23	5,538,067	2,245,000	701,000	4,569,000	13,053,067	11,045,540	0.846	2,007,527	0.154				
Aug 23	5,704,633	2,567,000	351,000	4,548,000	13,170,633	11,341,250	0.861	1,829,383	0.139				
Sep 23	5,597,770	2,461,000	1,232,000	4,242,000	13,532,770	11,729,120	0.867	1,803,650	0.133				
1st Qtr	16,840,470	7,273,000	2,284,000	13,359,000	39,756,470	34,115,910	0.858	5,640,560	0.142	20,909,150	38.7%	4,960,865	12.1%
								FALSE			-13,206,760		-679,695
Oct 23	5,872,000	2,486,000	1,821,000	4,354,000	14,533,000	12,608,367	0.868	1,924,633	0.132				
Nov 23	6,021,000	1,674,000	1,887,000	4,508,000	14,090,000	12,280,775	0.872	1,809,225	0.128				
Dec 23	6,355,000	2,433,000	1,236,000	4,629,000	14,653,000	12,616,126	0.861	2,036,874	0.139				
2nd Qtr	18,248,000	6,593,000	4,944,000	13,491,000	43,276,000	37,505,268	0.867	5,770,732	0.133	20,435,245	45.5%	4,528,370	21.5%
								43,276,000			-17,070,023		-1,242,362
Jan 24	6,335,000	2,590,000	935,000	4,703,000	14,563,000	12,464,345	0.856	2,098,655	0.144				
Feb 24	5,881,000	2,247,000	000000	5,172,000	13,300,000	11,438,905	0.860	1,861,095	0.140				
Mar 24	6,072,000	2,585,000	400,000	5,102,000	14,159,000	12,284,125	0.868	1,874,875	0.132				
3rd Qtr	18,288,000	7,422,000	1,335,000	14,977,000	42,022,000	36,187,375	0.861	5,834,625	0.139	19,085,306	47.3%	4,487,605	23.1%
								42,022,000			-17,102,069		-1,347,020
Apr 24	5,084,000	2,498,000	555,000	5,203,000	13,340,000	11,488,362	0.861	1,851,638	0.139				
May 24					0	#VALUE!	#VALUE!		#VALUE!				
Jun 24					0	#VALUE!	#VALUE!		#VALUE!				
4th Qtr	5,084,000	2,498,000	555,000	5,203,000	13,340,000	#VALUE!	#VALUE!	1,851,638	0.139		#VALUE!		#VALUE!
					0						#VALUE!		#VALUE!
Total 23/24	58,460,470	23,786,000	9,118,000	47,030,000	138,394,470	#VALUE!	#VALUE!	19,097,555	0.138	#VALUE!	#VALUE!	#VALUE!	#VALUE!

Boonsboro Keedysville Water Advisory Board
Wednesday February 28, 6:30 PM Boonsboro Town Hall

AGENDA

Rules of procedure: Members of the Water Advisory Board, alternates and town staff or others involved with the operation of the joint water system are welcome to sit at the table during our meetings provided there is sufficient room. Discussion is open but with priority given to members of the Board. The Chair reserves the right to limit discussion to Board members at his/her discretion in accordance with the Board's Bylaws. Voting is restricted to the 5 members of the Board or alternates serving in the place of a Board member.

- I. Approval of minutes: December 18, 2023 regular meeting
- II. FY23 Keedysville cost-sharing true-up *(if Boonsboro audit is available)*
- III. Review of CIP Projects
 - A. Park Well Replacement
 - B. Boonsboro Reservoir
- IV. Review quarterly usage report and metering between the Towns *(Jean)*
- V. Old business
 - A. Water resources/asset management study by Army Corps of Engineers
 - B. Draft new consolidated agreement between the Towns
 - 1. Update King Rd Associates future connections *(Tony, Jared, Drew)*
 - 2. Review by attorney of agreements with King Rd Associates *(Tony, Jared, Drew)*
 - 3. Review available capacity allocation *(Jean)*
- VI. New business
 - A. Review of proposed CIP projects for coming year *(Jared, Lisa)*
 - B. Review Water Rates for each town *(Jared, Lisa)*
- VII. System operator's report *(Pete)*
- VIII. Public comment

NEXT SCHEDULED MEETING: *Wed. Wednesday May 8, 2024 6:30 PM at Keedysville Town Hall*

(Regular meetings are 2nd Wednesday of Feb, May, August and December)

Standard Agenda Schedule:

February

- Review of current year CIP projects
- Review of proposed CIP projects for coming year
- Review of water rates for each town

May

- Review of current year CIP projects
- Review of proposed CIP projects for coming year

August

- Projected costs for
Keedysville for current
year Update of current
year CIP projects
- Review available capacity allocation

December

- True-up of prior year costs for Keedysville
- Review of current year CIP projects (included in
projected cost)

February 27, 2024

Via E-Mail to: townplanner@townofboonsboro.com

Andrew J. Bowen
Town Planner & Zoning Administrator
Town of Boonsboro
21 North Main Street
Boonsboro, MD 21713

RE: King Road Associates Annexation
Legal Opinion

Dear Drew:

By your letter dated February 16, 2024, you requested that I perform a legal review of the annexation agreements for the King Road Associates property. Specifically, on behalf of the Town of Boonsboro, you requested the following:

1. A legal opinion on whether the Town of Boonsboro is required to reserve sewer taps for the property? and;
2. A legal opinion on the best way for the Town of Boonsboro to move forward with the development of the property.

In accordance with this request, my legal opinions are set forth below.

A. Background

By way of background, on December 28, 2006, the Town of Boonsboro (the "Town") entered in an Annexation Agreement with King Road Associates, a Maryland Limited Partnership ("King Road") to annex certain property (the "Property") into the Town upon certain conditions (the "Annexation Agreement"). One main condition precedent as set forth in the First Annexation Agreement was that King Road was required to construct a portion of the future Warrior Boulevard "from its present terminus to Maryland Route 67"...and that King Road "shall not commence development of the Property until the described segment of Warrior Boulevard shall have been completed and opened to public use, except as may be required by the Town or the State Highway Administration."

On January 5, 2009, the Town and King Road entered into a First Amendment to Annexation Agreement (the "Amendment") which slightly changed the terms of the Annexation Agreement. Pursuant to the Amendment, the Town agreed to reserve Six Hundred Fifty-Six sewer taps for the use of King Road in connection with the development of the Property, with One Hundred Two (102) Sewer taps to be purchased ("Purchased Sewer Taps") and the remaining Five Hundred Fifty Four (554) to be reserved ("Reserved Sewer Taps"). The Amendment established the price for the Sewer taps to be purchased to be Eleven Thousand Dollars (\$11,000.00). Paragraph 4(a) of the Amendment also states: "Provided there shall have been no default by the Land Owner under this Agreement, there shall be no increase in the monetary consideration to be paid for the Sewer Taps covered by this Agreement."

As of the date of this opinion, King Road fulfilled its obligations in connection with providing payment for the Purchased Sewer Taps.

The Amendment also re-affirmed the importance of the construction of Warrior Boulevard as a condition to King Road's development of the Property. Indeed, Paragraph 5 of the Amendment states in pertinent part:

5. Warrior Boulevard. In the Annexation Agreement, the Town has required that the Land Owner construct, and the Land Owner has agreed to construct a segment of future Warrior Boulevard (a proposed transportation corridor contemplated to extend from MD Route 67, crossing MD Route 34 and MD Route 68, and proceeding across Alternate Route 40 along Chase Six Boulevard to intersect MD Route 66). The segment to be constructed by the Land Owner is described in the Annexation Agreement (the "King Road Associates Segment of Warrior Boulevard").

The completion of construction of the King Road Associates Segment of Warrior Boulevard may be deferred in the discretion of the Land Owner until all of the Purchased Sewer Taps are issued. Subject to Planning Commission approval, the construction of Warrior Boulevard may be phased as the development of the Property associated with the Purchased Sewer Taps progresses. Prior to issuance of any Reserved Sewer Taps, the Land Owner, at its expense, shall have commenced the construction of the King Road Associates Segment of Warrior Boulevard, and shall pursue the same with reasonable diligence to completion.

As of the date of this opinion, it is my understanding that Sycamore Run Phases One, Two, and Three have been developed as evidenced by deeds recorded among the Land Records of Washington County. Yet, to date, King Road has not even begun construction of its portion of Warrior Boulevard.

Next, Paragraph 13 of the Amendment states:

as of the Effective Date of this Agreement. However, nothing in this paragraph or in the Annexation Agreement shall be deemed to limit the current or future authority of the Town to establish, increase or alter any fee or charge imposed by the Town generally with respect to planning, zoning, subdivision, land use, utility service or building permit fees, provided the same are generally applicable to all other similar properties or developments in the Town. Except as otherwise provided in this Agreement, nothing in this Agreement shall limit the power of the Town to impose such fees, charges or requirements, or to amend the rates and charges generally applicable within the Town, from time to time.

This paragraph seems to suggest that the Town may increase or alter any fees or charge with respect to ...utility service.

It should also be noted that on October 16, 2020, King Road's status as a Limited Partnership was forfeited by the Maryland Department of Assessments and Taxation. King Road was revived on July 14, 2023. Thus, King Road as an entity ceased to exist

for a period of approximately three (3) years. During this time, King Road undertook – and had no legal capacity to undertake – no action in furtherance of the Annexation Agreement or First Amendment.

Lastly, it should be noted that neither the Annexation Agreement or First Amendment contain an express provision relating to any breach or default by either party. However, Paragraph 7 of Annexation Agreement gives the Town the authority to impose a moratorium on development as set forth below:

Paragraph 7. Moratorium and utilities.

7. Moratorium, etc. The Town reserves the absolute right to impose a moratorium on the development of the Property, in the reasonable discretion of the Town. In order to ensure concurrency of development and infrastructure, or for the purpose of providing an incentive to the Petitioner to comply with the provisions of this Agreement, the Town may, in its discretion, suspend or delay the issuance of building permits with respect to the construction of residential or other improvements on the Property. In addition to any other remedy for the breach of any obligation under this Agreement, the Town, upon resolution of the Mayor and Council, may issue a stop work order with respect to any aspect of the development of the Property, and the Petitioner shall promptly comply therewith.

Paragraph 7 clearly suggests that, as will be set forth below, the Town has legal remedies available to it in the event of a breach of contract by King Road.

B. Legal Opinion

1. Breach of Contract

The Annexation Agreement required the construction of Warrior Boulevard to be a condition precedent to King Road's development of the Property. The First Amendment modified this requirement to allow with Planning Commission approval, "the construction of Warrior Boulevard...be phased as the development of the Property associated with the Purchased Sewer Taps progresses."

As of the date of this opinion, King Road has neither received planning commission approval to phase the construction of Warrior Boulevard, nor has King Road not any construction of Warrior Boulevard. These failures amount to a material breach of contract by King Road.

The Maryland Supreme Court (formerly Maryland Court of Appeals) has stated that when "there has been a material breach by one party, the other party has the right to rescind." *Plitt v. McMillan*, 244 Md. 450, 454 (1966). More specifically:

It is not every partial failure to comply with the terms of a contract by one party which will entitle the other party to abandon the contract at once. In

order to justify an abandonment of it and of the proper remedy growing out of it, the failure of the opposite party must be a total one — the object of the contract must have been defeated or rendered unattainable by his misconduct or default. For partial derelictions and nonperformance in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must seek his remedy upon the stipulations of the contract itself. Before partial failure of performance of one party will give the other the right of rescission, the act failed to be performed must go to the root of the contract, or the failure to perform the contract must be in respect to matters which would render the performance of the rest a thing different in substance from that which was contracted for. When a covenant goes only to a part of the consideration of a contract, is incidental and subordinate to its main purpose, and its breach may be compensated in damages, such a breach does not warrant a rescission of the contract, but the injured party is still bound to perform his part of the agreement, and his only remedy for the breach consists of the damages he has suffered therefrom.

Barufaldi v. Ocean City, 196 Md. App. 1, 20, (2010) (quoting *Speed v. Bailey*, 153 Md. 655, 139 A. 534, 536 (Md. 1927). See *Publish Am., LLP v. Stern*, 216 Md. App. 82, 101 n.19, (2014).

Based on the above Maryland case law, in my professional legal opinion, the construction of Warrior Boulevard was an integral and important part of the Annexation Agreement and First Amendment, because the development of Property with a proposed residential density of up to 656 residential units will increase traffic congestion exponentially. Development of the Property has commenced with several phases already completed and King Road has not even begun to construct Warrior Boulevard as agreed. This failure is significant and likely would warrant the Town's rescission of the Annexation Agreement and First Amendment as written.

2. Other arguments

Without going too much into the proverbial "rabbit hole," a review of the circumstances of this Annexation suggests that the Town may have other legal arguments relating its obligation to perform and thus provide sewer taps at the rate of \$11,000.00 per tap under the First Amendment. Such arguments may include the legal question as to whether King Road abandoned the Annexation Agreement and First Amendment by failing to perform under those agreements for a period of three (3) years and/or whether under Paragraph 13 of the First Amendment the Town has the right to amend or alter the \$11,000.00 sewer tap fee.

Tangentially, it also bears noting that the Town may have other remedies available to it as well, such as an action in the courts to reform the Annexation Agreement and First Amendment under the theory that King Road's failure to act promptly and diligently (and for a period when it was a non-entity) was inequitable to the town and thus said delay now makes it unfair and imposes an undue cost burden on the town if the Town were to abide by the sewer tap pricing as agreed. ("one of two circumstances must exist before a court of equity will reform a written contract: either there must be mutual mistake, or

there must be fraud, duress, or inequitable conduct." *Md. Port Admin. v. John W. Brawner Contracting Co.* 303 Md. 44, 59 (1985)).

C. Conclusions

Specific to the Town's questions, it is my professional legal opinion that because King Road breached the Annexation Agreement and First Amendment, the Town is not required to reserve sewer taps for the Property.

In moving forward, the Town should be practical and reasonable and encourage smart development of the Property. Although the Town has the option of imposing a moratorium on the development of the Property and could suspend or delay building permits in connection with development of the Property under Paragraph 7 of the Annexation Agreement, I believe the Town's best option at this juncture is a renegotiation of the sewer tap rates with King Road rather than proceeding to rescind the agreements with King Road under a breach of contract theory. Paragraph 4a allows the Town to increase the consideration for the taps in the event of a default by King Road, which the failure to construct Warrior Boulevard constitutes.

The sewer tap rate as agreed is fifteen years old and entering into an additional contract to amend the Annexation Agreement to reflect current rates, along with a provision to ensure the construction of Warrior Boulevard as agreed, would be the advisable first course of action. Utilizing the moratorium clause in the Annexation Agreement to suspend the development of the Property pending a renegotiation of sewer tap cost may provide the Town with additional leverage in achieving its goals.

I do not believe that it is in the Town's best interest to undertake other legal actions at this time, i.e. lawsuits either to rescind or reform the agreements at issue.

I trust this opinion has answered your questions. I am available if further questions arise.

Very truly yours,



Brandy A. Peeples